Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

BARNEY DOYLE, et al., and
JOSEPH CUNETTA, et al.,

Petitioners,

v.

BELLSOUTH COMMUNICATION SYSTEMS, INC., and
BELLSOUTH TELECOMMUNICATIONS, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does § 2103 of the Employee Commuting Flexibility Act of 1996 (which retroactively amended § 4(a) of the Portal-to-Portal Pay Act of 1947 and extinguished Petitioners' claims against Respondents for travel-related overtime compensation under § 7(a)(1) of the Fair Labor Standards Act of 1938) violate the Takings and Due Process Clauses of the Fifth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS

The following were parties to Case No. 97-5122, U.S. Court of Appeals for the Sixth Circuit:

Plaintiffs/Appellants Barney Doyle, et al.

Barney Doyle
Samuel J. Carroll
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David A. Boshell
D.J. Pollefeyt
J.P. Clark
Keith G. Wickerham
Michael L. Garretson

Plaintiffs/Appellants Joseph Cunetta, et al.

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Respondents

BellSouth Communication Systems, Inc.
BellSouth Telecommunications, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Barney Doyle, et al., and Joseph Cunetta, et al. ("Petitioners"), respectfully request that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in Case No. 97-5122.

OPINIONS BELOW

The Court of Appeals' April 3, 1998, opinion in Case No. 97-5122, which affirmed the District Court's summary judgment (App. 1-3), has not been reported (*see*, Table-142 F.3d 433), but can be found at 1998 WL 165149.

The District Court's May 22, 1995, order of consolidation and tolling statute of limitations (App. 4-8) has not been reported.

The District Court's June 13, 1996, order denying Respondents' motions for reconsideration of the May 22, 1995, order (App. 9-15) has not been reported.

The District Court's December 3, 1996, order granting Respondents' motions for summary judgment in Case No. 94-2978-D (App. 16-29) has not been reported, but can be found at 1995 U.S. Dist. LEXIS 18874.

STATEMENT OF JURISDICTION

On April 3, 1998, the U.S. Court of Appeals, Sixth Circuit, in Case No. 97-5122, affirmed the District Court's judgment in Case No. 94-2978-D. Justice Stevens, on June

30, 1998, extended, until August 31, 1998, the time for Petitioners to petition for a Writ of Certiorari.

Section 1254(1), Title 28, U.S. Code, confers jurisdiction on this Court to review on a Writ of Certiorari the judgment of the Court of Appeals in Case No. 97-5122.

In accordance with 28 U.S.C. § 2403(a) and Supreme Court Rule 29.4(b), Petitioners have notified the Solicitor General of the United States of their intention to challenge the constitutionality of § 2103 (the retroactivity provision) of the Employee Commuting Flexibility Act of 1996 ("the Commuting Act"), PL. 104-188, 110 Stat. 1755, approved August 20, 1996, which amended 29 U.S.C. § 254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; not shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 7(a)(1) of the Fair Labor Standards Act of 1938, as amended ("the FLSA"), § 207(a)(1), Title 29, U.S. Code:

> "Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours specified at a rate not less than one and one-half times the regular rate at which he is employed."

Section 16(b) of the FLSA, 29 U.S.C. § 216(b):

"Damages; right of action; attorney's fees and costs; termination of right of action.

> "Any employer who violates the provisions of . . . section 207 of this title shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages . . . An action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State Court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs,

> allow a reasonable attorney's fee to be paid by the defendant, and costs of the action . . . "

Section 4(a) the Portal-to-Portal Pay Act of 1947 ("the Portal Act"), § 254(a), Title 29, U.S. Code (prior to its amendment by the Commuting Act):

> "**Activities not compensable.** Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended . . . , on account of the failure of such employer to pay an employee . . . overtime compensation, for or on account of any of the following activities of such employee engaged in on or after [May 14, 1947] –
>
> > (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
> >
> > (2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities."

The Employee Commuting Flexibility Act of 1996 ("the Commuting Act"), §§ 2101-2103, PL. 104-188, 110 Stat. 1755, 1928, approved August 20, 1996:

> "SEC.2101. SHORT TITLE.
>
> "This section and sections 2102 and 2103 may be cited as the 'Employee Commuting Flexibility Act of 1996'.

"SEC. 2102. PROPER COMPENSATION FOR USE OF EMPLOYER VEHICLES.

"Section 4(a) of the Portal-to-Portal Act of 1947 (29 U.S.C. 254(a)) is amended by adding at the end the following: 'For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee'.

"SEC.2103. EFFECTIVE DATE.

"The amendment made by section 2101 shall take effect on the date of the enactment of this Act and shall apply in determining the application of section 4 of the Portal-to-Portal Act of 1947 to an employee in any civil action brought before such date of enactment but pending on such date."

STATEMENT OF THE CASE

Respondent BellSouth Communication Systems, Inc. ("BSCS"), is a wholly-owned subsidiary of BellSouth Corporation, Atlanta, Georgia, which is publicly traded. At all pertinent times, BSCS was engaged in the business of providing "inside premises" telecommunications services in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

Respondent BellSouth Telecommunications, Inc. ("BST"), also a wholly-owned subsidiary of BellSouth Corporation, was at all pertinent times engaged in the business of providing "outside premises" or "network" telecommunications services in the same nine (9) states.

Petitioner Barney Doyle, on November 23, 1994, brought suit under §§ 7(a)(1) and 16(b) of the FLSA, 29 U.S.C. §§ 207(a)(1) and 216(b), against BSCS in the U.S. District Court, Western District of Tennessee, to recover overtime compensation for himself and other similarly situated BSCS employees who, between 1991 and 1994, had participated in BSCS's Motor Vehicle Usage Program ("the MVUP"). That suit was assigned Civil Action 94-2978. In his complaint, Petitioner Doyle claimed that participating BSCS field service technicians had been engaged in a "principal activity" (for which overtime compensation had been due) when each working day they had driven their stocked (with supplies), specially equipped BSCS-owned trucks from their respective homes to their respective first job assignments and from their respective final job assignments to their respective homes, where the trucks had been kept overnight.[1]

Petitioners Joseph Cunetta, et al., on January 27, 1995, brought suit under §§ 7(a)(1) and 16(b) of the FLSA, 29 U.S.C. §§ 207(a)(1) and 216(b), against BST in the General Jurisdiction Division, Eleventh Circuit Court of

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[1] The "consents to join" Civil No. 94-2978 of Petitioners S.J. Carroll, A.W. Bearded and David A. Boswell were filed on May 5, 1995. On May 15, 1995, those of Petitioners D.J. Pollefeyt and J.P. Clark were filed with the Clerk of the Tennessee District Court.

Florida (Miami-Dade County, Florida), to recover overtime compensation for themselves and other similarly situated BST employees who, between 1991 and 1994, had participated in BST's Home Dispatch Program ("the HDP"). That suit was assigned Case No. 95-1706 (CA 02). On February 14, 1995, BST removed Case No. 95-1706 (CA 02) to the U.S. District Court, Southern District of Florida, which assigned it Case No. 95-293-Civ-Atkins. In their complaint, Petitioners Cunetta, et al., claimed that participating BST field service technicians had been engaged in a "principal activity" (for which overtime compensation had been due) when each working day they had driven their stocked (with supplies), specially equipped BST-owned trucks from their respective homes to their respective first job assignments and from their respective final job assignments to their respective homes, where the trucks had been kept overnight.

BST, on April 19, 1995, moved to transfer Case No. 95-293-Civ-Atkins to the Western District of Tennessee pursuant to 28 U.S.C. § 1404(a). That motion was granted on May 4, 1995. Thereafter, the Clerk of the Tennessee District Court assigned Civil Action No. 95-2372 to the transferred lawsuit.

On May 22, 1995, the District Court issued an order consolidating Civil Actions No. 94-2978 and 95-2372 under the former docket number. In that order, the District Court also stated:

> "On May 17, 1995, an initial scheduling conference was held in case no. 94-2978. At the conference, plaintiffs' counsel indicated that pursuant to 29 U.S.C. § 255(a), a two year statute of limitations period continues to run against any

potential plaintiff until that individual files suit or 'opts into' the class maintaining the action. Plaintiffs' counsel also indicated that the two year period limits damages to the unpaid wages that have accrued two years prior to the time of filing suit or 'opting into' the class.

"It further appears that there is a dispute as to who is a proper member of the class. Until this issue is resolved, the potential plaintiffs cannot be notified nor can it be determined whether they wish to 'opt into' this litigation. Therefore, based on the above, the Court is faced with potential plaintiffs who may or may not wish to 'opt into' this litigation and a statute of limitations that continues to run against these potential plaintiffs, if any, limiting their damages, if any.

"The Court clearly possesses the authority to manage this action including authorization to send notice to any potential plaintiffs and approval of such notice. *See, Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989). The Court also has the authority to require the defendant employers to identify all potential plaintiff class members through discovery. *Id.* It further appears that the two year statute of limitation, 29 U.S.C. § 255(a), is a procedural limitation rather than substantive. *See, Partlow v. Jewish Orphans' Home of Southern Cal.*, 645 F.2d 757, 760 (9th Cir. 1981); *cf., Ott v. Midland-Ross Corporation*, 523 F.2d 1367, 1370 (6th Cir. 1975).

"The ADEA incorporates the enforcement provisions of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.A., § 201, *et seq.* (1982

ed. And Supp. V). *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 167, 110 S. Ct. 482, 485, 107 L. Ed. 2d 480 (1989). The district court, in *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989), concluded the statute of limitations governing ADEA claims could be tolled by equitable considerations. *See, Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 410 (1988). There, the Court found, although not deciding the issue, that plaintiffs presented a facially compelling case for equitable tolling, in part, based on delay occasioned by the Court issuing its ruling on the class membership issue. *Id.* F.R.D. at 410-11.

"Based on the circumstances of this case and upon review of the above case law, the Court concludes that it should toll the statute of limitations until the class membership issue is resolved. The Court takes this action as a precautionary measure to avoid prejudice to those potential plaintiffs who are not currently before the Court. The Court also finds that the purpose of the statute of limitation will not be frustrated by the Court's action as the statute is designed to ensure fairness to defendants and to notify them of claims that they must defend before the claims grow stale. *See, Partlow v. Jewish Orphans' Home of Southern Cal.*, 645 F.2d 757 (9th Cir. 1981) (citation omitted). This ruling does not preclude the Court from reviewing its decision at a later time according to the facts and merits as to each potential plaintiff/class member. *See, Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 410-411 (1988). Tolling the statute of limitations at this time will allow both sides to properly address and brief the issue and permit the Court to more carefully consider the issue.

> "Accordingly, the statute of limitations as to all potential plaintiffs in both these actions shall be tolled from date of entry of this order until the class membership issue has been determined and each prospective plaintiff receives notice of this litigation. The parties will be allowed to brief this issue and the Court may modify, expand and/or vacate this decision at a later time." (Footnote omitted)

The District Court, on June 12, 1996, entered an order denying Respondents' motions for reconsideration of that portion of the May 22, 1995, order which had tolled the statute of limitations. In its June 12, 1996, order, the District Court observed:

> "The plaintiffs have sought discovery of all potential plaintiffs (i.e., similarly situated employees) in the nine-state area where the defendants do business. According to the plaintiffs, the class of potential plaintiffs includes all BellSouth employees in the entire nine-state region who participated in the home dispatch program at any time during the three-year period preceding November 23, 1994, when the earlier of the two cases consolidated into the present case was filed. The defendants have disclosed at least 25 names of employees similarly situated to the plaintiffs.
>
> "The defendants claim that they have made a good faith effort to comply with their disclosure requirements by producing lists of the names and whereabouts of employees similarly situated to the plaintiffs, both in the Memphis area and in the Miami area. The defendants state, furthermore, that they are painstakingly trying to respond to the plaintiffs' discovery request as

quickly as possible. The defendants assert that they have no central historical database indicating home dispatch status for individual employees for the relevant time period, and that BellSouth is attempting to compile this information through a search of historical fleet maintenance records. The defendants claim to have nearly completed a list of approximately 5,000 employees in the nine-state area who may have participated in the home dispatch program during the relevant time period. The defendants represent that they are willing to produce the list when complete, subject to a protective order and pending a determination by the court of who is similarly situated.

* * *

"In the administration of an FLSA action, this court clearly possesses the authority to require of the defendants disclosure of the names and addresses of potential class members. To date, the defendants have failed to produce, to the satisfaction of the court, the names and addresses of potential class members who should receive notice of the pending action. Although 29 U.S.C. § 257 does not provide by its plain language tolling of the limitations period under § 255 of the same title, with regard to an individual not specifically named as a party plaintiff, in any instance other than the filing of a consent to become a party plaintiff, '[i]t is well established that equitable tolling is read into every federal statute of limitation'. *Ott v. Midland-Ross Corp.*, 600 F.2d 24 (6th Cir. 1979).

"After a thorough review of the record and law, the court finds that the equities warrant tolling of the limitations period as to all potential

> claimants until such time as the defendants comply with the court's order to produce the names and addresses of all potential class members. The court herein defines 'potential class members' as any of the defendants' present or former employees, in the nine-state area . . . who were non-salaried and non-management during the relevant period and engaged in the defendant's program generally referred to as 'home dispatch'. The court will then decide who is, and who is not, similarly situated. Furthermore, the May 23, 1995 Order Tolling Statute Of Limitations is subject to review according to each potential plaintiff/class member's facts and merits, and subject to be modified, expanded or vacated, in whole or in part, at any time by this court."

On June 12, 1996, the "consents to join" of 1,870 additional former participants in BST's HDP were filed with the Clerk of the District Court. The District Court at no time:

> (a) determined that BSCS and BST had complied with its order to produce the names and addresses of all potential class members;
>
> (b) held that the individuals who had filed "consents to join" were "similarly situated"; and
>
> (c) approved a form of notice to potential class members.

The Commuting Act was signed by the President on August 20, 1996. BSCS, on September 19, 1996, moved for summary judgment of dismissal on the ground that the Commuting Act had retroactively amended the Portal Act and extinguished Petitioners' claims for travel-related

overtime compensation under the FLSA. BST filed a similar motion on September 24, 1996.[2]

One of the arguments advanced by Petitioners in opposition to the BSCS and BST motions for summary judgment was that, in the absence of explicit legislative findings, the Commuting Act's retroactivity provision, § 2103, violated Petitioners' rights under the Fifth Amendment's Due Process Clause. The District Court, on December 3, 1996, rejected Petitioners' Due Process Clause challenge to the Commuting Act[3] and directed entry of final summary judgment for BSCS and BST.

Petitioners appealed. In the absence of a single reported decision declaring a federal statute unconstitutional by reason of its retroactivity, and concerned that sanctions could be imposed against them pursuant to Rule 38, Federal Rules of Appellate Procedure,[4]

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[2] Neither BSCS nor BST moved for leave to file pleadings invoking the Commuting Act.

[3] The District Court stated:

> "Finally, Plaintiffs contend that in the absence of legislative findings, the due process clause bars the retroactive application of the [Commuting] Act. The court finds this argument to be contrary to well settled law, and therefore without merit. Congress has the power to enact legislation that has retrospective application. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994)."

[4] Rule 38, Federal Rules of Appellate Procedure, is entitled "Damages and Costs for Frivolous Appeals" and provides:

> "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to

Petitioners did not pursue their Due Process Clause challenge to § 2103 of the Commuting Act before the Sixth Circuit. Instead, Petitioners contended that the District Court had erroneously determined that the Respondents had satisfied the Commuting Act's "normal commuting area for the employer's business or establishment" criterion.[5]

On April 3, 1998, the Court of Appeals affirmed the District Court's final summary judgment for BSCS and BST. Judge Merritt's opinion for the Sixth Circuit reasoned:

> "Plaintiffs' primary argument on appeal is that the district court improperly interpreted the requirement of the Employee Commuting Flexibility Act that the plaintiffs' commute be within the 'normal commuting area for the employer's business' if overtime compensation is to be

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respond, award just damages and single or double costs to the appellee."

[5] The District Court found and concluded that:

"Next, the court must examine whether the use is 'within the normal commuting area for the employer's business'. Pursuant to the CBA, home dispatch participants' commute to their first assignment was limited to 35 miles . . . For trips above 35 miles, the CBA provided that home dispatch employees would be paid a travel premium . . . Thus from the pleadings, affidavits, and undisputed facts, the court finds that the commute for home dispatch employees would not be any longer than for non home dispatch employees. Where the commute exceeded the negotiated range, the contract provided for a travel premium. Thus, the court finds that this prong of the test has been satisfied."

> denied. Plaintiffs did not raise the present argument below, and defendants correctly contend that the argument is waived. Counsel for plaintiffs candidly advised the court at oral argument that new lawyers have come into the case and have substantially changed the theory of their case. If this court now adopted plaintiffs' new arguments, the court would have to remand to the court below a new fact issue about the scope of the 'normal commuting area' and new legal issues concerning the burden of proof on this question. These issues were not litigated in the court below, and the parties agree that millions of dollars in damages may ride on how these issues are decided. This is not a class action, but our determination of these new issues could become a precedent binding thousands of employees of the defendants. Under these circumstances we believe it unwise and inappropriate to consider plaintiffs' new theory for the first time on appeal."

This Court, on June 25, 1998, issued its decision in Case No. 97-42, *Eastern Enterprises v. Apfel*, ___ U.S. ___, 118 S. Ct. 2131, *reversing Eastern Enterprises v. Chater*, 110 F.3d 150 (1st Cir. 1997) (hereinafter referred to as "*Eastern Enterprises*"). In an opinion written by Justice O'Connor and joined by the Chief Justice and Justices Scalia and Thomas, a plurality held that the Coal Industry Retiree Health Benefit Act of 1992 ("the Coal Act"), P.L. 102-486, Title XIX, Subtitle C, 106 Stat. 3036, *codified as* 26 U.S.C. §§ 9701-9722 (1994 ed. and Supp. II), violated the Takings Clause of the Fifth Amendment to the U.S. Constitution because it had improperly placed "a severe, disproportionate and extremely retroactive burden on Eastern." ___ U.S. at ___, 118 S. Ct. at 2153.

Justice Thomas, in a concurring opinion, expressed a willingness to reconsider *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648 (1798), and to hold that the Ex Post Facto Clause of the Constitution, Art. I, § 9, cl. 3, applies outside the criminal context. ___ U.S. at ___, 118 S. Ct. at 2154.

Finally, Justice Kennedy, concurring in the judgment and dissenting in part, concluded that the Coal Act was invalid under the Fifth Amendment's Due Process Clause. ___ U.S. at ___, 118 S. Ct. at 2154-2160.

Petitioners, on June 26, 1998, applied under Supreme Court Rule 13.5 to Sixth Circuit Justice John Paul Stevens for a 60 day extension of time in which to file a petition for writ of certiorari directed to the Sixth Circuit's decision in Case No. 97-5122. In that application, Petitioners in pertinent part stated:

> "7. The Court, on June 25, 1998, issued its decision in *Eastern Enterprises v. Apfel*, ___ U.S. ___ (Docket No. 97-42), holding unconstitutional the retroactivity provisions of the Coal Industry Retiree Health Benefit Act of 1992 ('the Coal Act'), 26 U.S.C. 9701-9722 (1994 ed. and Supp. II). Petitioners believe that the rationale of the Court's decision in *Eastern Enterprises, supra*, applies to and renders unconstitutional § 2103 of P.L. 104-188. However, Petitioners will be unable to prepare and file a petition for writ of certiorari advancing that argument by their July 1, 1998, deadline."

Justice Stevens, on June 30, 1998, in Application A-9, extended until August 31, 1998, the time within which Petitioners may file a petition for writ of certiorari

directed to the Sixth Circuit's decision in Case No. 97-5122.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD PERMIT PETITIONERS TO CHALLENGE THE CONSTITUTIONALITY OF § 2103 OF THE COMMUTING ACT.

In *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 42 (1944), this Court stated:

> "It is no answer that the artificial regular rate was a product of contract or that it was in excess of the statutory minimum. The [FLSA] clearly contemplates the setting of the regular rate in a bona fide manner through wage negotiations between employer and employee, provided that the statutory minimum is respected. But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes. *Even when wages exceed the minimum prescribed by Congress, the parties to the contract must respect the statutory policy of requiring the employer to pay one and one-half times the regular hourly rate for all hours actually worked in excess of 40. Any other conclusion in this case would exalt ingenuity over reality and would open the door to insidious disregard of the rights protected by the [FLSA].*" (Emphasis supplied)

In § 2102 of the Commuting Act, Congress modified the foregoing principle. Congress' directions (in § 2103) that

the Commuting Act be given retroactive effect[6] and that pending claims for travel-based overtime compensation under the FLSA be extinguished have posed three (3) important questions under the Takings and Due Process Clauses of the Fifth Amendment to the Constitution, as interpreted in *Eastern Enterprises*:

First, has § 2103 of the Commuting Act forced a considerable economic or financial burden upon those whose claims for travel-based overtime compensation have been extinguished?

Second, has § 2103 of the Commuting Act interfered with the reasonable investment-backed expectations of those whose claims for travel-based overtime compensation have been extinguished?

Third, does § 2103 of the Commuting Act implicate fundamental principles of fairness underlying the Takings and Due Process Clauses of the Fifth Amendment to the Constitution?

Eastern Enterprises stands as this Court's first invalidation of federal legislation by reason of its retroactivity.

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[6] In *Baker v. GTE North Incorporated*, 927 F. Supp. 1104 (N.D. Ind. 1996), the District Court held that the participants in an HDP identical to those of Respondents were entitled to travel-related overtime compensation under the FLSA. As noted in House Report 104-585, 104th Congress, 2d Session, May 20, 1996, in enacting the Commuting Act, Congress intended to overrule that decision, which was reversed in *Baker v. GTE North Incorporated*, 110 F.3d 28 (7th Cir. 1997). The Seventh Circuit held that the Commuting Act was retroactive and had extinguished the claimants' entitlements to travel-related overtime compensation under the FLSA.

Petitioners, in prosecuting their appeal to the Sixth Circuit, could not have anticipated such a dramatic development in this Court's approach to the Takings and Due Process Clauses of the Fifth Amendment to the Constitution.[7]

Prior to the expiration of their time in which to seek review of the April 3, 1998, judgment of the Court of Appeals, Petitioners (in their application to Justice Stevens for an extension of time) signaled to this Court their reliance upon the decision in *Eastern Enterprises* for the proposition that § 2103 of the Commuting Act is unconstitutional. Under these circumstances, Petitioners should be permitted to challenge the constitutionality of that statute.

Because this Court has established clear criteria in *Eastern Enterprises*, Petitioners believe that the constitutionality of § 2103 of the Commuting Act under the Takings and Due Process Clauses of the Fifth Amendment to the Constitution should be addressed, in the first instance, by the Sixth Circuit.[8]

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[7] Analogously, in *Johnson v. United States*, 520 U.S. 461 (1997), this Court held that for purposes of Rule 52(b), Federal Rules of Criminal Procedure, due to the intervening decision in *United States v. Gaudin*, 515 U.S. 506 (1995), the District Court's failure to submit to the jury the issue of materiality in a perjury prosecution constituted "plain error", which was reviewable on appeal notwithstanding the absence of a timely objection.

[8] The Court of Appeals could, in its discretion, remand the cause to the District Court for the entry of *Eastern Enterprises*-based factual findings upon which Petitioners' constitutional claims would thereafter be evaluated.

II.

BY GRANTING THE WRIT, THIS COURT WOULD PRESERVE THE TRAVEL-BASED OVERTIME COMPENSATION CLAIMS OF THE AS YET UNIDENTIFIED AND UN-NOTIFIED POTENTIAL MEMBERS OF THE PLAINTIFF CLASS.

Between ten thousand (10,000) and twenty thousand (20,000) current and former employees of BSCS and BST participated in the MVUP and the HDP between 1991 and 1994. Of those, fewer than two thousand (2,000) have filed "consents to join". The remaining participants are as yet unidentified and un-notified.

The result of the District Court's entry of final summary judgment in favor of BSCS and BST was the nullification of its orders equitably tolling the FLSA's statute of limitations with respect to the travel-based overtime compensation claims of the as yet unidentified and un-notified potential members of the plaintiff class.

The Sixth Circuit purported to act in the interests of those as yet unidentified and un-notified members of the plaintiff class when it declined to consider Petitioners' challenge to the District Court's finding that the Commuting Act's "normal commuting area for the employer's business" criterion had been satisfied. However, in so ruling the Court of Appeals also permanently time-barred the claims of those very persons.

Only by granting the Writ of Certiorari could this Court insure that the as yet unidentified and un-notified members of the plaintiff class would not be time-barred from challenging the constitutionality of § 2103 of the

Commuting Act and from prosecuting their claims for travel-related overtime compensation under the FLSA.

CONCLUSION

This Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (Case No. 97-5122) should be granted.

Respectfully submitted,

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NOT RECOMMENDED FOR PUBLICATION

No. 97-5122

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BARNEY DOYLE, et al.,	)	
Plaintiffs-Appellants,	)	**ON APPEAL FROM**
	)	**THE UNITED STATES**
V.	)	**DISTRICT COURT**
	)	**FOR THE WESTERN**
BELLSOUTH COMMUNICATIONS SYSTEMS, INC., et al.,	)	**DISTRICT OF TENNESSEE**
	)	
Defendants-Appellees.	)	(Filed Apr. 3, 1998)
	)	

Before MERRITT, CLAY, Circuit Judges; and BELL, District Judge*

MERRITT, Circuit Judge. Plaintiffs seek overtime compensation under the Fair Labor Standards Act for commuting in company-owned vehicles between home and work sites. Plaintiffs are a group of installation and repair technicians for the phone company who participate in a voluntary "home dispatch program" that allows them to travel to their first job directly from home and from their last job directly to home without going to an "office" to receive their assignments.

Specifically, this appeal concerns statutory construction of the Employee Commuting Flexibility Act of 1996,

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* The Honorable Robert Holmes Bell, District Judge, United States District Court for the Western District of Michigan, sitting by designation.

which amended Section 4(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. § 254. Section 254 now provides that "the use of an employer's vehicle for travel by an employee . . . shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business. . . . " The amendment was expressly made applicable to pending cases. 29 U.S.C. § 254(a) ("no employer shall be subject to liability under the Fair Labor Standards Act . . . on account of any of the following activities of such employee engaged in on or after *May 14, 1947*. . . . "). The district court granted summary judgment for defendants on the plain language of the statute.

Plaintiffs' primary argument on appeal is that the district court improperly interpreted the requirement of the Employee Commuting Flexibility Act that the plaintiffs' commute be within the "normal commuting area for the employer's business" if overtime compensation is to be denied. Plaintiffs did not raise the present argument below, and defendants correctly contend that the argument is waived. Counsel for plaintiffs candidly advised the court at oral argumnemt that new lawyers have come into the case on appeal and have substantially changed the theory of their case. If this court now adopted plaintiffs' new arguments, the court would have to remand to the court below a new fact issue about the scope of the "normal commuting area" and new legal issues concerning the burden of proof on this question. These issues were not litigated in the court below, and the parties agree that millions of dollars in damages may ride on how these issues are decided. This is not a class action, but our determination of these new issues could become

a precedent binding thousands of employees of the defendants. Under these circumstances we believe it unwise and inappropriate to consider plaintiffs' new theory for the first time on appeal.

The failure to raise the issue below is fatal to plaintiffs' appeal. In general, issues not presented to the district court but raised for the first time on appeal are not properly before the Court. *Taft Broadcasting Corp. v. United States*, 929 F.2d 240, 243-45 (6th Cir. 1991); *J.C. Wyckoff & Assoc. v. Standard Fire Ins.*, 936 F.2d 1474, 1488 (6th Cir. 1991). In cases where there are unusual circumstances or where the failure of this Court to address the issue would result in a miscarriage of justice we may deviate from the general rule. *Taft*, 929 F.2d at 245. This case presents no such situation. Accordingly, we affirm the judgment of the district court.

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT FOR TENNESSEE WESTERN DIVISION

BARNEY DOYLE, for and in behalf of himself and other employees similarly situated,	]	
Plaintiff,	]	
vs.	]	**Civil No. 94-2978-H/A**
BELLSOUTH COMMUNICATION SYSTEMS, INC., a subsidiary of BELLSOUTH CORPORATION, d/b/a BELLSOUTH TELECOMMUNICATIONS,	]	
Defendants.	]	

JOSEPH CUNETTA, et al.,	]	
Plaintiffs,	]	
vs.	]	**No. 95-2372-H/BRE**
BELLSOUTH TELECOMMUNICATIONS, INC., d/b/a SOUTHERN BELL TELEPHONE AND TELEGRAPH, CO.,	]	
Defendant.	]	

JOINT ORDER OF CONSOLIDATION AND ORDER TOLLING STATUTE OF LIMITATIONS
(Filed May 22, 1995)

In accordance with Rule 42(a) of the Federal Rules of Civil Procedure, the Court concludes the above actions

share common questions of law and fact and should be consolidated for pretrial proceedings. It further appears these actions may share the same or related corporate entities as defendants. Accordingly, the Court hereby **CONSOLIDATES** these cases for pretrial proceedings. The Court may review this ruling at a later time should circumstances warrant such action.

The parties are instructed to file all pleadings using the lead case style of *Doyle et al., v. BellSouth, et al.,* No. 94-2978, USDC (W.D.Tenn.). The parties should only use the docket number for the *Doyle* case, No. 94-2978-H/A, on all pleadings. The Clerk shall make the appropriate changes to the docket sheets and see that all the attorneys for both cases receive copies of any orders or action taken in these cases. Out of town counsel may participate in any pretrial scheduling conferences by telephone upon request and where appropriate.

Tolling the Statute of Limitations

These cases involve a dispute over compensation allegedly due plaintiffs for work done in excess of their regularly scheduled forty hour work week. Plaintiffs and others similarly situated employees of the defendants claim they are entitled to compensation for the time spent traveling to and from their residences to different work locations using company vehicles under defendants' "Motor Vehicle Usage Program" ("MVUP"). Plaintiffs also seek compensation for time spent preparing to go on these job sites and other activities. Plaintiffs filed this

action pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 (the "Act" or "FLSA"), 29 U.S.C. § 216(b) as amended.

On May 17, 1995, an initial scheduling conference was held in case no. 94-2978. At the conference, plaintiffs' counsel indicated that pursuant to, 29 U.S.C. § 255(a)[1], a two year statute of limitation period continues to run against any potential plaintiff until that individual files suit or "opts into" the class maintaining the action. Plaintiffs' counsel also indicated that the two year period limits damages to the unpaid wages that have accrued two years prior to the time of filing suit or "opting into" the class.

It further appears that there is a dispute as to who is a proper member of the class. Until this issue is resolved, the potential plaintiffs cannot be notified nor can it be determined whether they wish to "opt into" this litigation. Therefore, based on the above, the Court is faced with potential plaintiffs who may or may not wish to "opt into" this litigation and a statute of limitations that continues to run against these potential plaintiffs, if any, limiting their damages, if any.

The Court clearly possesses the authority to manage this action including authorization to send notice to any potential plaintiffs and approval of such notice. *See, Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct.

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[1] The Court assumes this section of the Act provides the applicable statute of limitation period as neither the attorneys or the Court have had the opportunity to brief or review this issue. It is agreed upon that a two year statute of limitation period is running against potential plaintiffs.

482, 107 L.Ed.2d 480 (1989). The Court also has the authority to require the defendant employers to identify all potential plaintiff class members through discovery. *Id.* It further appears that the two year statute of limitation, 29 U.S.C. § 255(a), is a procedural limitation rather than substantive. *See, Partlow v. Jewish Orphans' Home of Souther* [sic] *Cal.*, 645 F.2d 757, 760 (9th Cir. 1981), *cf., Ott v. Midland-Ross Corporation*, 523 F.2d 1367, 1370 (6th Cir. 1975).

The ADEA incorporates the enforcement provisions of the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U.S.C. § 201 *et seq.* (1982 ed. and Supp. V). *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 167, 110 S.Ct. 482, 485, 107 L.Ed.2d 480 (1989). The district court, in *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989), concluded the statute of limitations governing ADEA claims could be tolled by equitable considerations. *See, Sperling v. Hoffmann-La Roche, Inc.*, 118 F.R.D. 392, 410 (1988). There, the Court found, although not deciding the issue, that plaintiffs presented a facially compelling case for equitable tolling, in part, based on delay occasioned by the Court issuing its ruling on the class membership issue. *Id.* F.R.D. at 410-11.

Based on the circumstances of this case and upon review of the above case law, the Court concludes it should toll the statute of limitations until the class membership issue is resolved. The Court takes this action as a precautionary measure to avoid prejudice to those potential plaintiffs who are not currently before the Court. The Court also finds that the purpose of the statute of limitation will not be frustrated by the Court's action as the

statute is designed to ensure fairness to defendants and to notify them of claims that they must defend before the claims grow stale. *See, Partlow v. Jewish Orphans' Home of Souther* [sic] *Cal.*, 645 F.2d 757 (9th Cir. 1981) (citation omitted). This ruling does not preclude the Court from reviewing its decision at a later time according to the facts and merits as to each potential plaintiff/class member. *See, Sperling v. Hoffmann-La Roche, Inc.*, 118 F.R.D. 392, 410-11 (1988). Tolling the statute of limitations at this time will allow both sides to properly address and brief the issue and permit the Court to more carefully consider the issue.

Accordingly, the statute of limitations as to all potential plaintiffs in both these actions shall be tolled from date of entry of this order until the class membership issue has been determined and each respective plaintiff receives notice of this litigation. The parties will be allowed to brief this issue and the Court may modify, expand and/or vacate this decision at a later time.

IT IS SO ORDERED, this the 22 day of May, 1995.

/s/ Odell Horton
ODELL HORTON, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

BARNEY DOYLE, et al.,

Plaintiffs,

vs. No. 94-2978-D

BELLSOUTH COMMUNICATION SYSTEMS, INC., a subsidiary of BELLSOUTH CORPORATION, d/b/a BELLSOUTH TELECOMMUNICATIONS, et al.,

Defendants.

ORDER ON DEFENDANTS' MOTIONS FOR RECONSIDERATION OF STATUTE OF LIMITATIONS TOLLING ISSUE

(Filed Jun. 13, 1996)

Before the court are the motions of defendants BellSouth Communication Systems, Inc. (BCS) and BellSouth Telecommunications, Inc. (BST) (collectively, "the defendants" or "BellSouth"), for reconsideration of the court's May 23, 1995 Joint Order Of Consolidation And Order Tolling Statute Of Limitations.

FACTS AND PROCEDURAL POSTURE

This consolidated case involves a dispute over compensation allegedly due the plaintiffs for time spent traveling to and from their residences and different work

locations in company vehicles under the defendants' home dispatch program, as well as time spent preparing to go on these job sites. The underlying action is brought under section 16(b) [29 U.S.C. § 216(b)] of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, *et seq.*, (FLSA).

The plaintiffs have sought discovery of all potential plaintiffs (i.e., similarly situated employees) in the nine-state area where the defendants do business.[1] According to the plaintiffs, the class of potential plaintiffs includes all BellSouth employees in the entire nine-state region who participated in the home dispatch program at any time during the three-year period preceding November 23, 1994, when the earlier of the two cases consolidated into the present case was filed. The defendants have disclosed at least 25 names of employees similarly situated to the plaintiffs.

The defendants claim that they have made a good faith effort to comply with their disclosure requirements by producing lists of the names and whereabouts of employees similarly situated to the plaintiffs, both in the Memphis area and in the Miami area. The defendants state, furthermore, that they are painstakingly trying to respond to the plaintiffs' discovery request as quickly as possible. The defendants assert that they have no central historical database indicating home dispatch status for individual employees for the relevant time period, and that BellSouth is attempting to compile this information

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[1] Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

through a search of historical fleet maintenance records. The defendants claim to have nearly completed a list of approximately 5,000 employees in the nine-state area who may have participated in the home dispatch program during the relevant time period. The defendants represent that they are willing to produce the list when complete, subject to a protective order and pending a determination by the court of who is similarly situated.

In its *sua sponte* Order, the court tolled the two year statute of limitations under 29 U.S.C. § 255(a). In so ruling, the court weighed the harm to the defendants in tolling the statute of limitations against the harm which would be occasioned upon the entire class of potential plaintiffs should the statute of limitations be allowed to run. The court found that, because the § 255(a) limitation was fundamentally procedural rather than substantive in nature, and because the defendants were not prejudiced by the tolling in that they were on notice of the nature and extent of the potential claims against them, tolling the statute of limitations was warranted as an equitable, precautionary measure to avoid prejudice to those potential plaintiffs who were not currently before the court, until the class certification issue could be determined and each potential plaintiff received notice of the pending litigation was warranted. The court reserved the right to review and modify or vacate its decision in light of the parties' briefs, the totality of facts and circumstances surrounding this case, and the facts and merits of each potential plaintiff/class member as these persons came to be known.

DISCUSSION

The court maintains that it clearly possesses the authority to manage the action, including the power of approval over any proposed notice and even the power to send notice to any potential plaintiff. *See Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). *Sperling* was [an] action brought under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.*, (ADEA). Plaintiffs allegedly discharged or demoted on account of their age attempted to "certify" a class under 29 U.S.C. § 216(b), as incorporated into the ADEA by 29 U.S.C. § 626(b). The district court held that it was not inconsistent with the Congress' restrictive intent behind the Portal-to-Portal Act of 1947, 29 U.S.C. § 251, *et seq.*, and broad remedial intent behind the FLSA and the ADEA to equitably toll the two-year statute of limitations in 29 U.S.C. § 255(a) or to send notice to putative class members. *Sperling v. Hoffman-La Roche, Inc.*, 118 F.R.D. 392, 410, *aff'd* 862 F.2d 439 (3rd Cir. 1988), *aff'd*, 493 U.S. 165 (1989), *supra*. On a certified interlocutory appeal, the court of appeals stated that the notice issue "arises under both the FLSA and the ADEA." 862 F.2d at 444. The court of appeals went on to posit that "there is no legal impediment to court authorized notice in an appropriate case." *Id.* at 447; *see Braunstein v. Eastern Photographic Labs*, 600 F.2d 335 (2nd Cir. 1978) (*per curiam*), *cert. denied*, 441 U.S. 944, 99 S.Ct. 2162, 60 L.Ed.2d 1046 (1979); *see also United States v. Cook*, 795 F.2d 987 (Fed. Cir. 1986). The Supreme Court went one step further than the court of appeals, to state decisively that, pursuant to Fed. R. Civ. P. 83, district

courts have a managerial responsibility to assure that joinder of additional parties in representative or class action is done in an efficient and proper way. 493 U.S. at 170-74. Furthermore, the Court opined that, because the trial court is inevitably involved in cases where there are numerous plaintiffs entering written consents, early judicial intervention in case management (e.g., notice requirements) better defines the contours of the action and thereby benefits the parties. *Id.* at 171-72. Important considerations of benefit to the court include (1) avoiding a multiplicity of duplicative suits, (2) promoting settling, and (3) expediting the disposition of the action. *Id.* at 172.

The defendants argue that a later disposition of *Sperling* by the Third Circuit Court of Appeals in 1994, at 24 F.3d 463, drawing a distinction between the opt-in provisions of section 7 [29 U.S.C. § 257] of the Portal-to-Portal Act and the opt-out provisions of Fed. R. Civ. P. 23 incorporated into class actions brought under Title VII, a progenitor of ADEA, *see Sperling*, 24 F.3d at 470, should persuade the court that legal tolling under the FLSA in a non-ADEA action is contrary to Congressional intent. The court is not so persuaded.

In its 1947 enactment of the Portal-to-Portal Act, the Congress responded to the Supreme Court's decision in *Anderson v. Mount Clemens Pottery Co.*, 328 U.S. 680, 66 S.Ct. 487, 90 L.Ed. 1515 (1946). *See* 29 U.S.C. § 251 (Congress included, within section 1 [29 U.S.C. § 251] of the Portal-to-Portal Act, a statement of its findings and policy regarding the perceived need for the act); *see also Cook*, 795 F.2d at 990-91. Courts have generally construed the Congressional intent in the Portal-to-Portal Act as an emergency measure meant to foreclose retroactively the

thousands of FLSA suits filed in the wake of the Court's 1946 *Anderson* decision, which decision the Congress found to extend beyond the scope of legislative intent in the 1938 passage of the FLSA. *See* 29 U.S.C. § 251; *Sperling*, 493 U.S. at 173, 110 S.Ct. at 488; *see also Cook*, 795 F.2d at 990-91.

The *Cook* decision is illustrative of the majority view that, although the Congress intended the Portal-to-Portal Act to eliminate champertous representative actions brought under the FLSA following *Anderson*, the act does not evidence any intention on the part of Congress to curb courts' authority to order production of names and addresses of potential class members to facilitate notifying them of a pending FLSA action. *Cook*, 795 F.2d at 991; *accord Sperling*, 493 U.S. at 173, 110 S.Ct. at 488; *Partlow v. Jewish Orphans' Home of Southern California, Inc.*, 645 F.2d 757 (9th Cir. 1981); *Braunstein*, 600 F.2d at 336.

In the administration of an FLSA action, this court clearly possesses the authority to require of the defendants disclosure of the names and addresses of potential class members. To date, the defendants have failed to produce, to the satisfaction of the court, the names and addresses of potential class members who should receive notice of the pending action. Although 29 U.S.C. § 257 does not provide by its plain language tolling of the limitations period under § 255 of the same title, with regard to an individual not specifically named as a party plaintiff, in any instance other than the filing of a consent to become a party plaintiff, "[i]t is well established that equitable tolling is read into every federal statute of limitation." *Ott v. Midland-Ross Corp.*, 600 F.2d 24 (6th Cir. 1979).

CONCLUSION

After a thorough review of the record and law, the court finds that the equities warrant tolling of the limitations period as to all potential claimants until such time as the defendants comply with the court's order to produce the names and addresses of all potential class members. The court herein defines "potential class members" as any of the defendants' present or former employees, in the nine-state area, *supra* note 1, who were non-salaried and non-management during the relevant period and engaged in the defendant's program generally referred to as "home dispatch". The court will then decide who is, and who is not, similarly situated. Furthermore, the May 23, 1995 Order Tolling Statute Of Limitations is subject to review according to each potential plaintiff/class member's facts and merits, and subject to be modified, expanded or vacated, in whole or in part, at any time by this court.

IT IS SO ORDERED this 12th day of June, 1996.

/s/ Bernice Bouie Donald
BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

BARNEY DOYLE, et al.,

and Case No. 94-2978-D

JOSEPH CUNETTA, et al.,

Plaintiffs,

vs.

BELLSOUTH COMMUNICATIONS SYSTEMS, INC., a subsidiary of BELLSOUTH CORPORATION d/b/a BELLSOUTH TELECOMMUNICATIONS,

and

BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,

Defendants.

ORDER ON DEFENDANTS' BELLSOUTH COMMUNICATION SYSTEMS, INC. AND BELLSOUTH TELECOMMUNICATIONS, INC.; MOTIONS FOR SUMMARY JUDGMENT

(Filed Dec. 3, 1996)

Before the court are motions for Summary Judgment under Fed. R. Civ. P. 56(c) filed by Defendants BellSouth Communications systems, Inc., ("BSC") and BellSouth Telecommunications, Inc. ("BST") alleging that Plaintiffs'

claims are barred by the Employee Commuting Flexibility Act of 1996.

The basic facts for purposes of this motion are undisputed and are set forth in Defendants' memorandum. The court accepts those as true for purposes of this motion.

STATEMENT OF UNDISPUTED MATERIAL FACTS

Plaintiffs are BST or BSC employees who borrowed BST or BSC vehicles to commute to work. Plaintiffs who participated in this "home dispatch" program allege that the time they spent commuting from home to work and from work to home in the company owned vehicle constituted compensable hours worked. (Complaint.)

Plaintiffs borrowed these vehicles pursuant to an agreement reached in 1984 between the Communications Workers of America ("CWA") and BST. (Article 9.07, pp. 154 ff. of the Collective Bargaining Agreement ("CBA"); excerpts from CBA attached as Exhibit 1)). This agreement specified that participants in the home dispatch program would not be paid for the drive between their residence and their work locations. (CBA Article 9.07 F, p. 158).

Pursuant to the CBA, the home dispatch participants' commute to their first assignment was limited to a maximum of 35 miles. (CBA Article 9.07 C.1 and 9.07 E, pp. 155, 157). This distance was negotiated to ensure that home dispatch participants would not have to drive further than non-home dispatch participants. (Affidavit of Ronald Fairbanks, ¶ 13, attached as Exhibit 2). The CBA also allowed the union and BST and BSC to negotiate a

shorter maximum commute if warranted by urban congestion or natural barriers. *Id.*, (CBA Article 9.07 E. 1, 2, pp. 157-58). Furthermore, a computer program was utilized which gave home dispatch participants a first and last assignment as close as possible to their home. (Fairbanks Aff., ¶ 13). As a result, home dispatch participants' commutes were within the normal distances driven by the BST employees who did not elect to borrow company vehicles to commute from their homes to work and work to home. *Id.*

SUMMARY JUDGMENT

Summary Judgment pursuant to Federal Rules of Civil Procedure 56 is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment "bears the burden of clearly and convincingly establishing the nonexistence of any genuine issue of material fact, and the evidence as well as all inferences therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden-Alimark, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986). The burden on the party moving for summary judgment may be discharged by pointing out that there is an absence of evidence to support the nonmovinbg party's case." *Kauffman v. Allied Signal, Inc., Autolite Div.*, 970 F.2d 178, 182 (6th Cir.), *cert. denied*, 113 S.Ct. 831 (1992) (the moving party need not

support its motion with affidavits or other similar materials "negating" the opponent's claim) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

When confronted with a properly supported motion for summary judgment, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party. *Id.* The party opposing the motion must "do more than simply show that there is some meta-physical doubt as to the material facts." *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In short, the nonmoving party may not oppose a properly supported motion for summary judgment by mere reliance on the pleadings. *Celotex*, 477 U.S. at 324. "[I]n the 'new era' of summary judgments that has evolved from the holdings of the Supreme Court in *Anderson, Celotex and Matsushita*, trial courts have been afforded considerably more discretion in evaluating the weight of the nonmoving party's evidence." *Cox v. Kentucky Dep't of Trans.*, 53 F.3d 146, 150 (6th Cir. 1995). "If the record taken in its entirety could not convince a rational trier of fact to return a verdict in favor of the nonmoving party, the motion must be granted. *Id.*

This case arose because of a determination or opinion by the Department of Labor ("DOL") that commuting time for an employee is compensable. (August 5, 1994 DOL letter).

On August 2, 1996, Congress passed the Employee Commuting Flexibility Act of 1996 ("The Act"), which

was signed into law and became effective August 20, 1996. The Act amended Section 4(a) of the Portal-to-Portal Act, 29 U.S.C. § 254. Section 254(a) makes clear that commuting in an employer owned vehicle does not create compensable time.

Specifically the Act provides:

> Section 4(a) of the Portal-to-Portal Act of 1947 (29 U.S.C. 254(a)) is amended by adding at the end the following: "For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee."

Congress expressly made the Act applicable to existing or pending cases, and thus retroactive. The instant action was filed November 23, 1994, and is unequivocally covered in time by the legislation.

The Act provides two criteria: (1) the use of [the employer's] vehicle must be within the normal commuting area for the employer's business or establishment, and (2) the use must be subject to an agreement on the part of the employer and employee or representative of the employer.

At all times relevant to the events in question, a Collective Bargaining Agreement ("CBA") was in effect

between Plaintiffs and Defendants, and the CWA was the duly authorized bargaining agent for the Plaintiffs' claims. (Ex. 2, Defendants' Memorandum of Law). The subject activity, the home dispatch program, was covered by the Collective Bargaining Agreement.

As a part of the 1992 CBA, Defendants implemented a motor vehicle usage program which was described with particularity at Section 9.07 of the CBA, and governed by the CBA.

The motor vehicle usage or home dispatch program was negotiated with the CWA in 1984. The program was subsequently implemented at various intervals in districts across the region. (Fairbank's Affidavit ¶ 3).

Thus, the requirement that the use be subject to an agreement on the part of the employer/employee is satisfied.

Next, the court must examine whether the use is "within the normal commuting area for the employer's business." Pursuant to the CBA, home dispatch participants' commute to their first assignment was limited to 35 miles. (CBA Art. 9.07 C.1 and 9.07 E; Fairbanks Affidavit ¶ 13) For trips above 34 miles, the CBA provided that home dispatch employees would be paid a travel premium (Fairbank's Affidavit ¶ 13), and Ex 2 to BSC's motion for Summary Judgment. Thus from the pleadings, affidavits, and undisputed facts, the court finds that the commute for home dispatch employees would not be any longer than for non home dispatch employees. Where the commute exceeded the negotiated range, the contract provided for a travel premium. Thus, the court finds that this prong of the test has been satisfied.

Plaintiffs contend that notwithstanding the legislation, there exists genuine issues of material fact such that Summary Judgment would be improper. Specifically, Plaintiffs aver that an issue exists as to whether the Plaintiffs used company vehicles for a purpose other than for travel which was integral and indispensable to their principal activities and which benefitted BSC and BST. Plaintiffs postulate:

> [t]he plain meaning of the 1996 amendment to the Portal Act is that an employee who uses an employer's vehicle *solely* "for travel" is not entitled to compensation therefor under the Fair Labor Standards Act. By inference, however, an employee who uses an employer's vehicle "for travel" *and* for another purpose "integral and indispensable" to his or her "principal activity" which benefits his or her employer is entitled to receive [overtime] compensation under the Fair Labor Standards Act for his or her performance of the latter function.

(Plaintiff's Response to Defendants' Summary Judgment motion).

Plaintiffs argue that there exists a genuine issue of material fact whether Plaintiffs, as participants in the BSC and BST Home Dispatch Programs, satisfied the "another purpose" criterion when they transported tools and equipment in company vehicles to and from the work sites designated by BSC and BST.

A fundamental rule of statutory construction is where a statute is clear and unambiguous on its face, the court should not resort to legislative intent. The wording of the subject Act is clear and unambiguous in that it

provides "the use of an employee's vehicle for travel by an employee and activities . . . which are incidental to the use of such vehicle for commuting shall not be considered part of the employer's principle activities . . . " The home dispatch policy and the CBA's "defined" use is consistent with the language of the Act. Plaintiff has not provided any affidavits, or other statements to evince a use contrary to that described in the CBA and contemplated by the Act.

In the fact of a properly supported motion for Summary Judgment, the non-moving party may not simply rely on the pleadings or conclusionary statements. *Celotex v. Catrett*, 477 U.S. 317, 324. The non-moving party must set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Plaintiffs have sought to create a issue by construing the language of the Act such that a heightened requirement is produced. However, having attempted to recast the statute, Plaintiffs have failed to set forth any facts, properly supported, on which a reasonable trier of fact could find for Plaintiffs. Thus, the court finds that Plaintiffs have failed to show the existence of a genuine issue of material fact.

Next, Plaintiffs argue there exists a genuine issue of material fact whether plaintiffs were "commuting" while they participated in the BSC and BST Home Dispatch Programs. To support this position, Plaintiffs state that prior to its amendment in 1996, § 4(a) of the Portal Act, 29 U.S.C. § 254(a), introduced, but did not define, that term. Plaintiffs contend that the term "commuting", as used in

the amended § 4(a) of the Portal Act, 29 U.S.C. § 254(a), does not apply to their daily travels in BSC and BST vehicles from their homes to their first work sites and from their last work sites to their homes because their first and last work sites varied from day-to-day.

In construing the statute, words and phrases should be given their ordinary meaning based on custom and usage. The word commute is to, *inter alia*, "travel back and forth regularly or frequently." *Webster's Third New International Dictionary* (3d ed. 1981). Thus, the fact that a different synonym may have been sued in the Portal-to-Portal Act does not negate the meaning of the Act. Thus, no genuine issue of fact is created as to whether Plaintiffs were in fact engage [sic] in commuting.

Next, Plaintiffs argue that there exists a genuine issue of material fact whether plaintiffs were engaged in a "principal activity" when they received their daily first job assignments from BSC and BST by electronic means "off the clock" also known as "commute time."

Plaintiffs have produced no facts to support this proposition. The affidavits of Max Logan, Ronald Fairbanks, and the undisputed facts show that the activity described by Plaintiffs as "commute time" is incidental to the Plaintiffs use of the employer's vehicle for commuting. Plaintiffs cite and rely on *Baker v. GTE North, Inc.*, 927 F. Supp. 1104 (N.D. Ind. 1966), however, the facts in *Baker v. GTE* are distinguishable from the case at bar. Moreover, Congress in enacting the subject litigation, overruled *Baker v. GTE*, In *Baker*, the court found:

> that the plaintiff electricians' pre-shift activities, including the filling out time sheets, checking

> job locations, cleaning out and loading their trucks with the necessary materials, fueling the trucks, and picking up the electrical plans for the day's jobs, were within the broad range of "principal activities" performed at their employer's behest and for the benefit of the business." These activities would have been compensable had they been performed during the course of the workday."

927 F. Supp. at 1112.

The objective proof as set forth in defense affidavits militates against such a finding.

> If a technician did not wish to borrow his BST [or BSC] vehicle for commuting, he was required to leave his vehicle overnight at a BST [or BSC] marshaling yard. He would drive his personal car to the yard in the morning, where he would pick up his portable computer terminal (with the first assignment) and his truck. His compensable work time began at this point, He would then proceed through the work day, periodically receiving new assignment on his computer. At the end of the day, he would drive his truck back to the yard, where his compensable work day ended. He would then commute home in his personal car.
>
> An employee who elected to borrow his BST [or BSC] vehicle under the home dispatch program parked his BST [or BSC] vehicle at home. He received his first assignment at home on a portable computer – a process which took at most a minute or two, and which on many computers was completely automated and took no time at all. *He made no report to BST or [BSC]; he merely received the location of his first work site for the day.*

He traveled to the first assignment in the borrowed truck. His compensable work time started when he reached his first work site. He then proceeded through his day like any other technician. His compensable time ended as he left his last work site to drive the truck home. (Emphasis added)

Home dispatch employees in almost all instances drove ordinary mini-vans, vans, and pickups. The BST [or BSC] vehicles' complement of options was similar to that which one might find on any ordinary mini-van, or pickup. BST's [and BSC's] vehicles had automatic transmissions, power steering, power brakes, radios, etc. . . .

During the periods at issue in this lawsuit, home dispatch had *no* duties related to the BST [or BSC] vehicle while they were at home or during the drive to/from work. They were expressly instructed *not* to wash the truck, fuel the truck, service the truck, inspect the truck, etc., at home or during their commute. These tasks only were to be performed during the work day while the employee was on the clock.

The nature of the tools which each BST [and BSC] vehicle carried varied with the driver's job duties. Some trucks carried ladders and wire, as well as having built-in drawers for storage of small parts. However, other trucks carried much less. None of the tools or supplies which any home dispatch employee carried made during the BST [or BSC] vehicle in any way more difficult than the vehicle would have been without the tools and supplies. None of the hand tools or supplies required any attention or maintenance

from the driver while the driver was commuting to and from work.

* * *

By agreement with the union, home dispatch employees' commute from home to their first assignment or from their last assignment was less than 35 miles. For trips above 35 miles, the union contract specified that home dispatch employees would be paid a travel premium. In congested urban areas, the union had the option to negotiate a *shorter* distance which would trigger the travel premium. Furthermore, BST [and BSC] programmed its job-assignment computer to each home dispatch employee a first and last job which was a [sic] close as possible to his home. It was BST's [and BSC] experience that by virtue of this computer program, home dispatch employees' commutes were shorter than non-home dispatch employees' commutes to and from the marshaling yards. BST's [and BSC's] reason for this computer program was pragmatic; it wanted to minimize the mileage on the borrowed trucks.

Employees who borrowed a BST or [BSC] truck were asked not to carry alcohol in the truck and not to carry unauthorized passengers. The reason for this was to minimize BST's [and BSC's] additional liability exposure by virtue of letting its employees borrow BST [or BSC] trucks for commuting.

BST [nor BSC] employees were not required to wear any sort of uniform during the period at issue in this suit, either during the work day or during their commute. BST [and BSC] subsidized the purchase of work shirts for employees, and many employees wore these

> shirts. However, wearing these shirts was at each employee's discretion, and many chose not to wear them.

(Affidavit of Ronald Fairbanks); See also, Affidavit of Max Logan.

Based on the foregoing affidavits, the court finds that Plaintiffs did not engage in any compensable activity incidental to their use of the employer's vehicle. Thus, there exists no genuine issue of material fact as to this point.

Finally, Plaintiffs contend that in the absence of legislative findings, the due process clause bars the retroactive application of the Act. The court finds this argument to be contrary to well settled law, and therfore without merit. Congress has the power to enact legislation that has retrospective application. *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed. 2d 229 (1994).

Where the temporal effect of a statute is manifest on its face, there is no need to resort to judicial default rules for determining retroactive effect, and the inquiry ends. *Lockheed v. Spink*, 116 S.Ct. 1783 (1996). When Congress includes a provision that specifically addresses the temporal effect of the statute, that provision trumps any inferences that may be drawn. *Id.* Congress stated unequivocally that the Act applied to litigation pending at the time of the legislation.

CONCLUSION

Based on all the foregoing, there exists no genuine issue as to any material fact such that defendants BSC and BST are entitled to judgment as a matter of law. The Clerk is ordered to enter judgment this 3rd day of December 1996.

/s/ Bernice B. Donald
BERNICE B. DONALD
UNITED STATES
DISTRICT JUDGE

No. 98-359

Supreme Court, U.S.
FILED
SEP 28 1998
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

BARNEY DOYLE, et al. and
JOSEPH CUNETTA, et al.,

Petitioners,

v.

BELLSOUTH TELECOMMUNICATIONS, INC. and
BELLSOUTH COMMUNICATION SYSTEMS, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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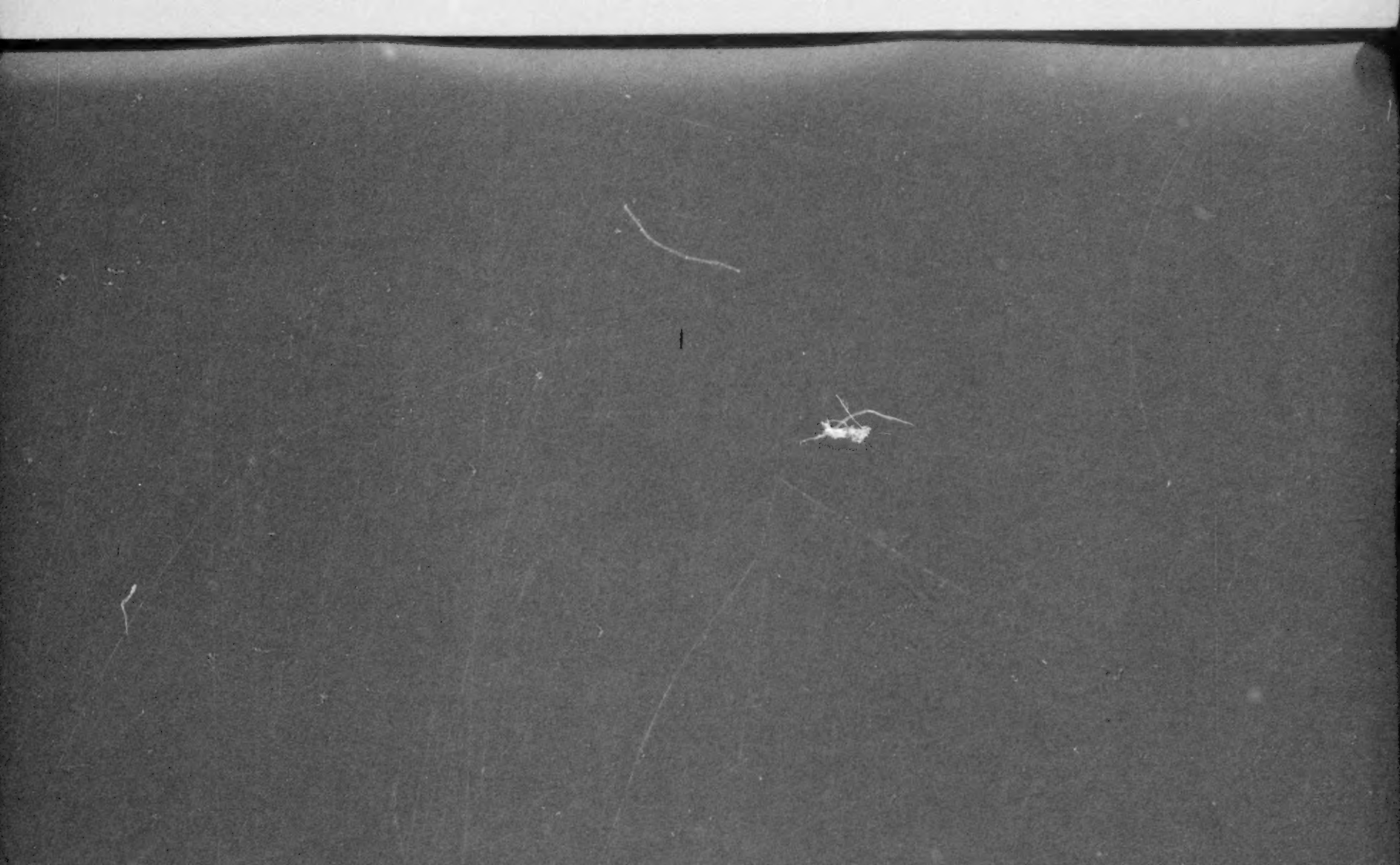

QUESTIONS PRESENTED:

1. May Petitioners raise before this Court an argument which they specifically waived before the United States Court of Appeals for the Sixth Circuit?

2. Is certiorari appropriate to hear Petitioners' constitutional attack on a federal statute when neither Petitioners, nor the District Court, nor the Circuit Court, timely notified the Attorney General of the constitutional attack to allow the United States to intervene, in contravention of 28 U.S.C. § 2403(a) and Federal Rule of Appellate Procedure 44?

3. Was the District Court's application of existing law in granting BST summary judgment a "retroactive" application of the law, and, if so, was that "retroactive" application of the law constitutional?

LIST OF PARTIES

RESPONDENT BELLSOUTH TELECOMMUNICATIONS, INC.

Its Parent company:	BellSouth Corporation
Its Partially-owned subsidiaries:	Movicel S.A. 1155 Peachtree Associates

RESPONDENT BELLSOUTH COMMUNICATION SYSTEMS, INC.

Its parent company:	BellSouth Telecommunications, Inc.
Its partially-owned subsidiaries:	None

PLAINTIFFS/PETITIONERS (Note that there is a dispute about which individuals are parties. Plaintiffs/Petitioners filed approximately 2000 "opt-in" notices which Defendants/Respondents moved to strike on a variety of grounds. The District Court granted Defendants summary judgment without ruling on those motions to strike.)

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I. REASON FOR DENYING THE WRIT

BellSouth Telecommunications, Inc., and BellSouth Communication Systems, Inc., (collectively, "BST") respectfully submit that Petitioners' Petition for Writ of Certiorari should be denied for three reasons. First, Petitioners improperly seek to raise before this Court an argument that they specifically waived before the United States Court of Appeals for the Sixth Circuit. Second, in contravention of 28 U.S.C. § 2403(a) and Fed. R. App. P. 44, Petitioners attempt a constitutional attack on a federal statute, yet neither Petitioners nor the District Court nor Circuit Court timely notified the Attorney General of the constitutional attack to allow the United States the opportunity to intervene. Third, the District Court's application of existing law to dismiss Petitioners' pending case was not "retroactive" application of the law, and was, in any event, constitutionally correct.

BST also asks that the Court impose all costs and fees which it legitimately can on Petitioners to discourage frivolous petitions for writs of certiorari such as this one and to defray BST's expense in responding to this frivolous petition.

II. FACTUAL BACKGROUND

A. Description Of The Home Dispatch Program:

Respondent BST is a telephone company which operates in a nine-state area in the Southeast. Petitioners are BST employees who borrowed BST vehicles to commute to work. Petitioners who participated in this "home dispatch" program allege that the time they spent commuting from home to work and from work to home in BST's

vehicles constituted compensable hours worked under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* Almost all home-dispatch participants were telephone technicians whose work required them to travel to trouble spots to make repairs. Home-dispatch participants received their assignments on a hand-held computer terminal at home in the morning or called in from home to receive their assignments. They then got in their borrowed BST trucks and traveled to their respective first assignments. At day's end they traveled home in their BST trucks, which they parked at their homes for the night.

Home dispatch was a negotiated provision of a collective bargaining agreement between BST and Communications Workers of America, AFL-CIO, Petitioners' Union. The Union agreed that the commuting time was not compensable, and that provision was incorporated in the contract.

Home dispatch was completely voluntary. Employees who chose not to participate in the program drove their personal cars to a BST yard, where they received their first assignments and picked up their BST trucks.

The home-dispatch program was popular with employees because it saved commuting wear and tear on their personal cars and in many instances allowed households to manage with one fewer car. Employees were even allowed to run personal errands in their borrowed trucks on the way to and from work as long as those errands did not significantly lengthen their commute. BST benefitted too, because home dispatch increased productivity and because BST could divest some vehicle

storage facilities. The Seventh Circuit, examining a home-dispatch program operated by another telephone company which was in most respects identical to BST's, pronounced the program a "win-win" situation. *Baker v. GTE North, Inc.*, 110 F.3d 28, 29 (7th Cir. 1997).

B. The Department Of Labor's Vacillations On The Compensability Of Travel Time And The Resulting Passage Of The Employee Commuting Flexibility Act:

This case (and similar suits against other companies) arose because of an August 5, 1994, Department of Labor ("DOL") opinion letter which contradicted the DOL's long-standing position that commuting time in an employer-owned vehicle is not compensable hours worked. That opinion letter was swiftly suspended (October 19, 1994, letter from Secretary of Labor Robert Reich, attached as Appendix pp. 1-2) and was superseded with a new opinion letter which restored the *status quo ante*. (April 3, 1995, DOL opinion, letter attached as Appendix pp. 3-4.) However, many lawsuits – this one among them – were filed in the interim.

In response to this situation, Congress introduced remedial legislation on a bipartisan basis in March, 1995. That legislation, now enacted as the Employee Commuting Flexibility Act ("the Act"), P.L. 104-188, §§ 2101-2103, amends Section 4(a) of the Portal-to-Portal Act, 29 U.S.C. § 254(a), to make clear that commuting in an employer-owned vehicle does *not* constitute compensable hours worked. President Clinton signed the Act into law on August 20, 1996.

Section 201 of the Act adds the following language to the Portal-to-Portal Act:

> For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

C. The Act States That It Applies To Pending Cases:

By its terms, the Act governs this pending action and all actions pending at the time the Act was enacted. As Section 202 of the Act states:

> The amendment made by section 1 shall take effect on the date of the enactment of this Act and *shall apply in determining the application of Section 4 of the Portal-to-Portal Act of 1947 to an employee in any civil action brought before such date of enactment but pending on such date.*

(Emphasis added.)

The case at bar was pending on the date of the Act's enactment. Thus, the Act's provision specifying the Petitioners' commutes in borrowed BST trucks are not principal activities under the Fair Labor Standards Act (and are therefore noncompensable) applies to this action. As discussed below, it is debatable whether this language was

even necessary in order for the Act to apply to cases pending at the time of its passage; nevertheless, Congress' inclusion of this language removes all doubt about Congressional intent.

D. Plaintiffs/Petitioners Attack The Constitutionality Of The Act In District Court, Then Abandon Their Constitutional Attack Before The Court Of Appeals:

BST moved for summary judgment based on the Act. Petitioners attempted to avoid summary judgment by arguing that the Act's mandate that it applied to any case pending on the date of its enactment was unconstitutional "retroactive" legislation. (*See*, Plaintiffs' Memorandum of Law in Opposition to Defendants' Motions for Summary Judgment Premised on P.L. 104-188, §§ 2101-2103, filed November 15, 1996, District Court Docket No. 195, Appendix pp. 5-26.) They contended before the District Court that because of "the absence of the requisite legislative findings, the Due Process Clause of the Fifth Amendment . . . bars the [Act's] retroactive application. . . . " (*Id.* at p. 6.) It is unclear what Petitioners' confusing reference to constitutional effect of "the requisite legislative findings" means. In any event, the District Court rejected this argument and granted BST summary judgment on December 3, 1996.

On appeal, Petitioners completely abandoned their constitutional attack on the Act. Instead, Petitioners presented to the appellate court a charge that the District Court misapplied the "normal commuting area" language of the Act. Petitioners did not present this issue to the

District Court, and Petitioners candidly admitted in oral argument before the Court of Appeals for the Sixth Circuit that they conceived the issue only after new counsel joined them for the appellate brief.[1] The Court of Appeals denied Petitioners' appeal, ruling, "The failure to raise the issue below [relating to the Act's "normal commuting area" language's application to the Petitioners' situation] is fatal to plaintiffs' appeal." *Doyle et al. v. BellSouth Communications Systems, Inc. et al.*, CA 97-5122, 1998 WL 165149, at *3 (6th Cir., April 3, 1998).

Neither the District Court nor Petitioners notified the United States Attorney General of Petitioners' attack on the Act's constitutionality, in contravention of 28 U.S.C. § 2403(a). This statute requires the Attorney General to be notified of any challenge to the constitutionality of any federal statute so that the United States may intervene in the action to defend the statute's constitutionality. (This point is discussed in more detail below.) Furthermore, because Petitioners abandoned their constitutional attack before the appellate court, they did not comply with Fed. R. App. P. 44, which requires a party questioning a statute's constitutionality "to give immediate notice in writing to the court of the existence of said question," to allow the court to certify the fact to the United States Attorney General. Again, the United States was denied notice to allow it to intervene in this action.

---

[1] Petitioners' abandonment of their constitutional attack likely was influenced by the Seventh Circuit's opinion in *Baker*, 110 F.3d at 29, which ruled that the Act's application to pending litigation was completely proper and also ruled that such a constitutional challenge to the Act on taking and due process grounds could be disposed of "without ado."

Now Petitioners seek to resurrect their constitutional attack on the Act before this Court, even though they did not present the issue to the Court of Appeals. The sole basis for their Petition for Writ of Certiorari is that the alleged "retroactive" application of the Act to this litigation is allegedly an unconstitutional taking of a property without due process, contrary to the United States Constitution.

III. LEGAL ARGUMENT

There are three independent grounds on which the Petition for Writ of Certiorari should be denied. First, Petitioners seek certiorari to raise an issue which they specifically abandoned before the Court of Appeals and which that court neither considered nor ruled upon. This issue may not now be raised before this Court. Second, Petitioners failed to take the steps necessary to notify the United States Attorney General in a timely manner that Petitioners sought to attack the constitutionality of a federal statute, as required by 28 U.S.C. § 2403(a) and Fed. R. App. P. 44. Third, Petitioners' assertion that the Act is a "retroactive" taking without due process is mistaken, and the case which Petitioners cite in support of this position is inapposite to this case. Each of these points is addressed in turn below.

A. Petitioners' Failure To Raise Any Constitutional Challenge Before The Court of Appeals Prevents Them From Raising Such A Challenge Before The Supreme Court:

Petitioners contend before this Court that the Act's express application to pending cases (which Petitioners incorrectly call a "retroactivity provision") is unconstitutional because it effects a taking without due process in contravention of the Fifth and Fourteenth Amendments. Petitioners specifically abandoned this constitutional challenge on appeal before the Court of Appeals, and it should be deemed waived. Petitioners frankly admit that had they pursued their constitutional challenge before the Court of Appeals, they would have been "concerned that sanctions could be imposed against them [for a frivolous appeal] pursuant to Rule 38, Federal Rules of Appellate Procedure. . . . " (Petition for Writ of Certiorari, p. 13; hereafter, "Petition, p. ___.")

Petitioners attempt to excuse their failure to raise their constitutional challenge in the court below by arguing that, until this Court's recent decision in *Eastern Enterprises v. Apfel*, ___ U.S. ___, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998), there was not "a single reported decision declaring a federal statute unconstitutional by reason of its retroactivity. . . . " (Petition, p. 13.) Petitioners assert that they could not raise their retroactivity issue until the Supreme Court decided *Eastern Enterprises*, which Petitioners contend created "new law" on the subject of

retroactivity.[2] As the Petition states at pp. 18-19, "*Eastern Enterprises* stands as this Court's first invalidation of federal legislation by reason of its retroactivity. Petitioners, in prosecuting their appeal to the Sixth Circuit, could not have anticipated such a dramatic development in this Court's approach to the Takings and Due Process Clauses of the Fifth Amendment to the Constitution."

As an initial matter, it is interesting that Petitioners felt no compunction against presenting the constitutional issue to the District Court, even though Petitioners now allege that their issue had no legal support until *Eastern Enterprises* was decided more than a year after the District Court granted BST summary judgment, and even though Petitioners state that they could not argue retroactivity to the Court of Appeals without risking sanctions for pursuing a frivolous appeal. (Petition, p. 13.)

Leaving that point aside, however, Petitioners' assertion that *Eastern Enterprises* was the first time the Supreme Court had struck down a retroactive statute on takings and due process grounds is flatly wrong. Many cases have struck down a retroactive statute on takings and due process grounds. *See, e.g., Untermyer v. Anderson*, 276 U.S. 440, 48 S. Ct. 353, 72 L. Ed. 645 (1928); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 55 S. Ct. 758, 79 L. Ed. 1468 (1935); *Stewart v. Keyes*, 295 U.S. 403, 55 S. Ct. 807, 79 L. Ed. 1507 (1935). In light of these cases,

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[2] As is discussed below, Petitioners' reliance on *Eastern Enterprises* is misplaced.

Petitioners' allegation that they *could not* raise the retroactivity issue until this Court decided *Eastern Enterprises* is specious.[3]

Finally, regardless of the reason for Petitioners' abandonment of their constitutional attack, the fact that they did abandon it means Petitioners may not resurrect the issue before the Supreme Court. It is axiomatic that an issue not presented to the Court of Appeals may not be raised before the Supreme Court. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pennsylvania Dept. of Corrections v. Yeskey*, ___ U.S. ___, 118 S. Ct. 1952, 1956, 141 L. Ed. 2d 215 (1998), *quoting Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970).

Because Petitioners seek to present an issue to the Supreme Court which the Court of Appeals for the Sixth Circuit did not consider, their Petition for Writ of Certiorari is improper and should be denied.

B. Petitioners' Constitutional Argument Is Not Properly Before This Court Because The Attorney General Was Not Notified In A Timely Manner:

As described above, Petitioners argued and lost the constitutional issue before the District Court. However, this issue was not even properly raised before the District

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[3] The issue in *Railroad Retirement Board* was in fact very similar to that in *Eastern Enterprises:* whether Congress could impose retroactive pension liability on a company.

Court because neither Petitioners nor the District Court notified the Department of Justice prior to challenging the statute's constitutionality, as is required by 28 U.S.C. § 2403(a). Because of this failure to notify the United States of the constitutional challenge, the United States did not have the opportunity to intervene at the District Court level[4] and present its arguments in favor of the statute's constitutionality.

Petitioners also did not certify their constitutional question to the Sixth Circuit, in contravention of Fed. Rule App. P. 44. This failure too is fatal to their quest for certiorari. In a case attacking the constitutionality of the same statute which is at issue in the present matter, the Seventh Circuit noted that the failure to comply with Rule 44 created doubt as to whether the constitutional attack could even be presented before the Court of Appeals. *Baker,* 110 F.3d at 30.[5]

The record is thus not fully developed and this matter is not ripe for certiorari. This failure to provide statutorily-required notice to the United States at either the District Court or Court of Appeals level militates against this Court hearing Petitioners' constitutional attack on the Act.

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[4] Petitioners belatedly notified the Department of Justice of their constitutional challenge only after they took the initial steps to obtain a Writ of Certiorari before this Court.

[5] The Seventh Circuit nevertheless ruled that it could dispose of the constitutional attack "without ado."

C. Petitioners' Retroactivity Argument Is Meritless:

1. The Act Clarified Existing Law and Did Not Retrospectively Reverse Established Rights:

Although Petitioners claim that the Act is "retroactive" and also claim that the statute's alleged retroactive effect is unconstitutional, Petitioners' use of the word "retroactive" is incorrect in the context of this case. The Act did not undo a final court decision or otherwise reach back in time to upset parties' established legal rights or expectations. Instead, Petitioners sued to establish a new right, alleging that ambiguities in the Portal-to-Portal Act and inconsistent enforcement by the Wage-Hour Division of the DOL should be resolved in Petitioners' favor to entitle them to an undeserved windfall, even though Petitioners: (a) volunteered to borrow company vehicles; (b) knew their Union agreed that the commuting time was not compensable hours worked; and (c) themselves benefitted from home dispatch by not having to use a personal vehicle for commuting.

In rejecting Petitioners' claims, the District Court simply applied the law which was in effect at the time of its decision. It has long been established that courts must apply the then-current law absent some direction to the contrary from Congress; the fact that the law was enacted after a case was filed is of no moment. *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1974) ("We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory

direction or legislative history to the contrary."). *See also, Thorpe v. Housing Auth. of the City of Durham*, 393 U.S. 268, 281, 89 S. Ct. 518, 21 L. Ed. 2d 474 (1969) (same).

Even in the absence of the so-called "retroactivity" provision in the Act which Petitioners challenge, the result in this case would have been the same. The District Court would have applied the new legislation to the then-pending case, in accordance with Supreme Court precedent, and the case would have been dismissed on summary judgment. Petitioners' allegations regarding "retroactivity" are thus misplaced. Retroactivity is actually not even an issue in this matter, and there is certainly no colorable argument that application of the then-current law to a pending case in any sense implicates constitutional taking or due process. Petitioners' Petition for Writ of Certiorari should be rejected on this independent basis.

2. The Act Is A Constitutionally Sound Exercise Of Congress's Power To Pass Retroactive Legislation; Petitioners' Due Process Argument Is Misplaced:

Even assuming the Act is "retroactive," it is still valid. Its application to the present matter was proper, and Petitioners' due process argument is meritless.

Petitioners correctly state that it has long been Supreme Court precedent that Congress may pass legislation with retrospective effect. (Petition, p. 13.) There is a well-established line of cases holding that Congress has the constitutional authority to enact retrospective legislation. *See, e.g., Landgraf v. USI Film Products*, 511 U.S. 244,

114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994) ("Where the Congressional intent [regarding retroactivity] is clear, it governs. . . . "), *quoting Kaiser Aluminum & Chemical Corp. v. Bonjourno*, 494 U.S. 827, 836-837, 110 S. Ct. 1570, 108 L. Ed. 2d 842 (1990). The Act is one of myriad "legislative Acts adjusting the burdens and benefits of economic life." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976). Such legislation "come[s] to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Id.* "[T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 104 S. Ct. 2709, 81 L. Ed. 2d 601 (1984). Retrospective application of economic legislation meets the test of due process simply if "retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 730 "[J]udgments about the wisdom of such legislation remain within the exclusive providence of the legislative and executive branches," and should not be second-guessed by courts. *Id.* at 729.

Petitioners did not make any effort to show that Congress acted irrationally in passing the Act, and that omission alone is fatal to their constitutional attack and their Petition for Writ of Certiorari. Indeed, far from being irrational, there are many rational legislative purposes for the Act. Judge Easterbrook, writing for the Seventh Circuit and approving the Act's constitutionality against an attack on due process grounds, identified two

such rational purposes: the Act conforms law to contract (remember that Petitioners' collective bargaining contract stated that home-to-work commuting in borrowed BST trucks was non-compensable), and the Act resolves an ambiguity in the Portal-to-Portal Act's use of the words "principal activities." *Baker*, 110 F.3d at 30. Other rational purposes for the Act include conforming the law to the DOL's long-standing enforcement position and clarifying that employees and employers may take advantage of the "win-win" benefits of borrowing an employer's vehicle for commuting.

Petitioners' inability to make even the slightest showing that Congress acted irrationally dooms their constitutional attack on due process grounds. Because their constitutional attack is frivolous, their Petition for Writ of Certiorari to review this constitutional question should be denied.

3. The Act Does Not Effect A Taking Under The Law:

Even assuming that the Act does not conform to due process, Petitioners' constitutional attack is still meritless as there is no evidence in the record that the Act effects an unconstitutional taking. The Court identified three factors in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), for determining when a law effects a taking. The factors examine the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action. *Id.* at 124. Petitioners presented no evidence at any stage of this

litigation that the Act had any economic impact on them or that the Act interfered with Petitioners' investment-backed expectations. Indeed, it would be extraordinary if Petitioners could make even the slightest showing on either point because Petitioners volunteered for the home dispatch program with the contractual understanding that they would *not* be paid for their commuting time. The existence of the contract answers the inquiry into the Petitioners' expectations. The contract's agreement that commuting time would not be paid was in conformity with the then-current DOL enforcement position. The Act took nothing from Petitioners. Indeed, the Act prevented Petitioners from receiving an unanticipated windfall.[6]

Because there was no taking, Petitioners' constitutional attack is frivolous on this separate ground and a writ of certiorari should be denied.

4. This Court's Opinion In Eastern Enterprises Does Not Alter The Prior Law:

Despite the plethora of Supreme Court decisions holding that retrospective legislation is entirely proper, Petitioners now assert that the Court's recent plurality opinion in *Eastern Enterprises v. Apfel*, ___ U.S. ___, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998), reverses established precedent and justifies certiorari in this case. This assertion that *Enterprises* overturns all prior Supreme Court precedent regarding Congress's ability to pass retroactive legislation is incorrect. *Eastern Enterprises* addresses an

[6] BST questions whether a lawsuit, short of a final judgment, is even property which can be the subject of a taking.

entirely different point from the alleged retroactivity of the legislation in this case, namely, whether Congress may force a company to pay the unbargained-for health and pension benefits of employees who worked for it twenty to fifty years earlier. *Eastern Enterprises* does not overturn prior precedent regarding Congress's ability to pass retroactive legislation. Indeed, *Eastern Enterprises* approvingly cites *Landgraf* – the case on which the District Court relied in rejecting Petitioners' claims.

The instant case also is a particularly poor vehicle to elaborate on the plurality opinion in *Eastern Enterprises*, both because of Petitioners' procedural errors in this case and because none of the factors which informed the Court's opinion in *Eastern Enterprises* is present here. Specifically, the plurality in *Eastern Enterprises* found the Coal Industry Retiree Health Benefit Act (the "Coal Act") unconstitutional because it imposed a severe, disproportionate, and extremely retroactive liability on a limited class of parties who could not have anticipated the liability. In the instant case, there was no retroactive liability imposed. Here, also, the collective bargaining agreement established the parties' expectation that Petitioners would not receive pay for commuting time. The Act merely confirmed the lawfulness of the relationship established by the collective bargaining agreement. Thus, none of the factors that led the plurality to declare the Coal Act unconstitutional is present in the instant matter.

Because Petitioners' cited caselaw is inapposite, certiorari should be denied.

IV. CONCLUSION

For the reasons described above, Petitioners' Petition for Writ of Certiorari is not well-taken and should be denied. BST also asks that the Court impose costs and fees on Petitioners to discourage frivolous petitions for writs of certiorari such as this one.

Respectfully submitted,

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U.S. DEPARTMENT OF LABOR
SECRETARY OF LABOR
WASHINGTON, D.C.

OCT 19 1994

The Honorable William D. Ford
Chairman, Committee on
Education and Labor
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your interest in the Department's interpretation of the Fair Labor Standards Act (FLSA) on the compensability of certain travel time between home and work of employees who drive employer's vehicles to transport equipment needed to perform their job. I appreciate your calling to our attention the potential consequences of this interpretation of the law.

As you may know, the Department of Labor's Wage and Hour Division published an opinion letter on August 5, 1994, which sets forth our interpretation of the FLSA in certain circumstances. While this opinion reflects a long-standing interpretation of the Department, dating at least to 1967, the recent opinion letter was published to clarify issues that arose in complaint-based investigations involving home heating oil service technicians in the New York metropolitan area. Thus, the current concerns seem to arise not from the promulgation of a new Departmental policy, but rather the application of an existing policy in an industry where established employment practices had not previously been reviewed.

Nonetheless, in light of the concerns you have raised and the possible effects of applying this interpretation in, among others, the home heating oil industry, I have decided to defer any Departmental efforts to enforce this policy while we undertake a review. You should know, however, that while this review goes on, employees retain their private right to litigate to obtain compliance with the requirements of the FLSA.

Again, thank you for bringing these important issues to my attention. I hope that you will find this action responsive to your concerns.

Sincerely,

/s/ Robert B. Reich
ROBERT B. REICH

U.S. Department of Labor [LOGO]

Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

APR 3 1995

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Washington, D.C. 20005-2301

Gentlemen:

This is in further regard to the Department of Labor's interpretation under the Fair Labor Standards Act (FLSA) of the compensability of time spent by employees voluntarily driving their employers' vehicles between home and customers' work sites each day, transporting parts, tools, equipment, etc., needed to perform their jobs. Our interpretation was set forth in an opinion letter dated August 5, 1994.

We have continued to review this matter since issuance of the August 5 opinion letter. We note that driving between work sites is a necessary component of the job which is performed throughout the day and is a principal activity of the employees. Furthermore, the employee may not leave the employer's vehicle at the site of the last service call, but must drive it to a location satisfactory to the employer for security – the employer's establishment, a garage, or the employee's home.

We are also aware, however, that driving from home to work is an activity which is not ordinarily compensable,

and that the employees in question have chosen to drive the employer's vehicle home rather than to the employer's yard for their own personal convenience and benefit.

We have, therefore, concluded that a balancing of the interests of employers and employees is appropriate. Accordingly, where the following circumstances exist, time spent traveling between the employee's home and the first work site of the day and between the last work site of the day and the employee's home need not be compensated: (1) driving the employer's vehicle between the employee's home and customers' work sites at the beginning and end of the workday is strictly voluntary and not a condition of employment; (2) the vehicle involved is the type of vehicle that would normally be used for commuting; (3) the employee incurs no costs for driving the employer's vehicle or parking it at the employee's home or elsewhere; and (4) the work sites are within the normal commuting area of the employer's establishment.

Our opinion letter of August 5, 1994, is hereby withdrawn.

Sincerely,

/s/ Maria Echaveste
Maria Echaveste
Administrator

N94233

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION AT MEMPHIS

(1) BARNEY DOYLE, for and in behalf of himself and other employees similarly situated,

(2) JOSEPH CUNETTA, et al.,

Plaintiffs,

No. 94-2978 D

vs.

(1) BELLSOUTH COMMUNICATION SYSTEMS, INC., a subsidiary of BELLSOUTH CORPORATION, d/b/a BELLSOUTH TELECOMMUNICATIONS,

(2) BELLSOUTH TELECOMMUNICATIONS, INC., etc.,

Defendants.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT PREMISED UPON P.L. 104-188, §§ 2101-2103

I. INTRODUCTION

Relying upon P.L. 104-108, §§ 2102-2103, August 20, 1996, which amended § 4(a) of the Portal-To-Portal Pay Act ("the Portal Act"), 29 U.S.C. § 254(a), Defendants BellSouth Communication Systems, Inc. ("BSCS") and

BellSouth Telecommunications, Inc. ("BST"), have moved in the above styled, related overtime compensation lawsuits for summary judgments of dismissal.

As established in this memorandum of law, the summary judgment motions of BSCS and BST should be denied because:

> (A) there exist **genuine issues of material fact** whether the Plaintiffs, as participants in the BSCS and BST "Home Dispatch Programs",
>
> > (1) used company vehicles for a purpose, other than "for travel", which was "integral and indispensable" to their "principal activity,
> >
> > (2) were "commuting" in company vehicles, and
> >
> > (3) were engaged in a "principal activity" when they received their daily first job assignments by electronic means "off the clock" (also known as "connect time"); and
>
> (B) due to the absence of the requisite legislative findings, the Due Process Clause of the Fifth Amendment to the United States Constitution ("the Due Process Clause") bars the retroactive application of P.L. 104-188, §§ 2101-2103, to Plaintiffs' claims against BSCS and BST for overtime compensation.

II. THE HISTORICAL SETTING

Prior to the enactment of P.L. 104-188, *supra*, § 4(a) of the Portal Act, 29 U.S.C. § 254(a), in pertinent part provided:

> "No employer shall be subject to any liability or punishment under the [Fair Labor Standards Act] on account of the failure of such employer to pay an employee . . . overtime compensation, for or on account of any of the following activities of such employee . . .
>
> > (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
> >
> > (2) activities which are preliminary to or postliminary to said principal activities . . . "

In *Baker v. GTE North, Inc.*, 927 F. Supp. 1104, 3 Wage & Hour Cases 2d (BNA) 527, 1996 U.S. Dist. LEXIS 6880 (N.D. Ind., February 21, 1996), the District Court examined a telephone company's Home Dispatch Program which was **virtually identical** to the BSCS and BST Home Dispatch Programs and concluded that the participating service technician employees were entitled to receive overtime compensation under the Fair Labor Standards Act for the time they spent travelling daily in company-owned vehicles from their homes to their first job assignments and from their last job assignments to their homes.[1]

Six (6) months after the decision in *Baker v. GTE North, Inc., supra,* Congress enacted §§ 2102 and 2103 of P.L. 104-188, which read:

---

[1] Plaintiffs contend that *Baker v. GTE North, Inc., supra,* was correctly decided. BSCS and BST contend to the contrary.

"**§ 2102** Section 4(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. 254(a)) is amended by adding at the end the following: For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

§ 2103 The amendment made by section 2102 shall take effect on the date of the enactment of this Act and shall apply in determining the application of section 4 of the Portal-to-Portal Act of 1947 to an employee in any civil action brought before such date of enactment but pending on such date."

III. THE PARTIES' CONTENTIONS

In their motions for summary judgment of dismissal, BSCS and BST contend that P.L. 104-188, §§ 2102-2103, *supra*.

(1) as a matter of law, nullified Plaintiffs' claims for overtime compensation; and

(2) is retroactively applicable to Plaintiffs' claims against BSCS and BST for overtime compensation pending herein, and is unaffected by any limitations generally imposed on such retroactivity by the Due Process Clause of the U.S. Constitution.

Plaintiffs, however, contend that the entry of summary judgments in favor of BSCS and BST would be erroneous because the August 20, 1996, amendment to § 4(a) of the Portal Act, 29 U.S.C. § 254(a)

> (1) did *not*, as a matter of law, nullify Plaintiffs' claims for overtime compensation; and
>
> (2) due to the absence of the requisite legislative findings, cannot be retroactively applied to Plaintiffs' claims against BSCS and BST for overtime compensation.

IV. DISCUSSION AND ARGUMENT

A. The Existence Of Genuine Issues Of Material Fact

In *Nichols v. City of Chicago*, 789 F. Supp. 1438 (N.D. Ill. 1992), canine patrol officers brought an action under the Fair Labor Standards Act to recover compensation for home dog-care activities. The City moved for summary judgment. Denying that motion, Judge Alesia stated:

> "Whether an activity is preliminary or postliminary to a principal activity is a question of fact . . . " (Citations omitted)

789 F. Supp. at 1441.

The defendant's motion for summary judgment was denied in *Lee v. Am-Pro Protective Agency, Inc.*, 860 F. Supp. 325 (E.D. Va. 1994), in which security guards sought overtime compensation for the time it took them to change into and out of their uniforms, on site. Judge Brinkema explained:

> "Summary judgment is only appropriate where no genuine issue of material fact is in dispute . . . In deciding whether to grant summary judgment, all reasonable inferences must be drawn in favor of the non-moving party . . .
>
> "Drawing all inferences in the light most favorable to the non-moving party, there is ample evidence in the record that would support a finding that being in uniform, and therefore, putting on the uniform, is an integral and indispensable part of the Am-Pro security guards' principal activity, because it is both done for the benefit of the employer, and is necessary to the performance of the guards' principal activity . . . " (Citations omitted)

860 F. Supp. at 327-328.

In *McGrath v. City of Philadelphia*, 864 F. Supp. 466 (E.D. Pa. 1994), an action by city police department employees of varying ranks for overtime compensation under the Fair Labor Standards Act, the District Court denied cross-motions for summary judgment. Judge Hutton noted:

> "In Count II of the Complaint, the plaintiffs allege that the City has violated the FLSA overtime provisions by failing to compensate certain sergeants and lieutenants who routinely come to work fifteen minutes early in order to prepare roll call for the officers coming on duty for that shift. The City argues that there is a genuine issue of material fact of the issue of whether the plaintiffs' roll call activities constitute compensable work, and that, accordingly, summary judgment is inappropriate. It is the plaintiffs' burden to establish that a given activity constitutes

work. *See McIntyre v. Division of Youth Rehabilitation Services*, 796 F. Supp. 668, 673 (D.Del. 1992).

"The Portal-to-Portal Act of 1947 provides in relevant part than an employer need not compensate its employees for activities that are 'preliminary to or postliminary to' the 'principal activity or activities' that an employee is engaged to perform, unless the employer is otherwise required to compensate its employees for such work by custom, contract or practice . . . 29 U.S.C. § 254(a)(2). The term 'principal activity or activities' includes all activities that are 'integral and indispensable' to the principal activity. *Steiner v. Mitchell*, 350 U.S. 247, 253, 76 S. Ct. 330, 334, 100 L. Ed. 267 (1956); *Brusstar v. Southeastern Pennsylvania Transportation Authority*, 636 F. Supp. 1557, 1558 (E.D. Pa.1986). To determine whether an activity is 'integral and indispensable' to the principal activity, the court must inquire into "whether [the activities] are performed as part of the regular work of the employees in the ordinary course of business", *Truslow v. Spotsylvania County Sheriff*, 783 F. Supp. 274, 177 (E.D. Va. 1992), *quoting Dunlop v. City Electric, Inc.*, 527 F. 2d 394, 401 (5th Cir. 1976)).

"There is a genuine issue of material fact precluding the entry of summary judgment on the sergeants' and lieutenants' pre-shift roll call claims. The plaintiffs have directed the Court to evidence that sergeants and lieutenants do 'occasionally' arrive prior to roll call to prepare and be ready to conduct roll call at the beginning of the shift . . . This alone is insufficient to establish that pre-shift roll call preparation was 'integral and indispensable' to sergeants' and

> lieutenants' principal activities. Further, the Court cannot determine what sergeants' and lieutenants' *principal* activity was from the evidence adduced by the plaintiffs. Accordingly, the Court cannot make any determination as to the relationship between roll call activities and sergeants' and lieutenants' other duties, let alone a determination that there was an 'integral and indispensable' relationship between the two.
>
> "Moreover, there is evidence in the record that the plaintiffs are responsible for reporting their 'time in' and 'time out' to personnel in the operations room, who then prepare a Daily Attendance Report ('DAR') . . . Plaintiffs, usually lieutenants, sign off attesting to the accuracy of records demonstrating the amount of time they spend engaging in pre-shift activities . . . The City has produced evidence that the plaintiffs' attendance records do not reflect the alleged pre-shift activities for which they seek to recover in Count II . . . After reviewing the evidence currently in the record and identified by the parties, the Court holds that a reasonable trier of fact could find that the alleged pre-shift activities are not an 'integral and indispensable' part of sergeant and lieutenant plaintiffs' principal activity. Accordingly, the plaintiffs' motion for summary judgment on the issue of pre-shift roll call preparation is denied." (Footnote omitted)

864 F. Supp. 482-483.

For the reasons that follow, the enactment of P.L. 104-188, §§ 2102-2103, does not, by itself, entitle BSCS and BST to summary judgments of dismissal in these lawsuits.

(1) There Exists A Genuine Issue Of Material Fact Whether Plaintiffs Used Company Vehicles For A Purpose, Other Than "For Travel", Which Was "Integral And Indispensable" To Their "Principal Activity" And Which Benefited BSCS And BST.

The plain meaning of the 1996 amendment to the Portal Act is that an employee who uses an employer's vehicle *solely* "for travel" is not entitled to compensation therefor under the Fair Labor Standards Act. By inference, however, an employee who uses an employer's vehicle "for travel" *and* for another purpose "integral and indispensable" to his or her "principal activity" which benefits his or her employer is entitled to receive [overtime] compensation under the Fair Labor Standards Act for his or her performance of the latter function.

There exists a genuine issue of material fact whether Plaintiffs, as participants in the BSCS and BST Home Dispatch Programs, satisfied the "another purpose" criterion when they transported tools and equipment in company vehicles to and from the work sites designated by BSCS and BST. On this point, Judge Miller's following observations in *Baker v. GTE North, Inc., supra,* militate against the entry of summary judgments in favor of BSCS and BST in these cases:

> "Under *Dunlop's* test, the plaintiffs' driving is principal if it is done 'as part of the regular work of the employees in the ordinary course of business', and is 'necessary to the business and is performed by the employees, primarily for the benefit of the employer, in the ordinary course of that business'. *Dunlop,* 527 F.2d at 401. Transporting tools and equipment to work sites is part of the plaintiffs' regular work, done in

the ordinary course of business. All facility maintainers, not just those participating in the HDP, must transport their tools and equipment to the work site to perform their duties. The transporting of tools and equipment in the GTE vehicles is also necessary to the business' of repairing and maintaining telephone and transmission equipment, and is done for the benefit of GTE. The Home Dispatch Program benefits the plaintiffs, but the transporting of necessary tools and equipment is integral to the performance of their duties, and primarily benefits GTE.

"The plaintiffs' driving is not merely preliminary or postliminary to their principal activities because it is not an activity 'predominantly . . . spent in [the employees'] own interests, from which no benefit [ ] inure[s] to the company'. *Dunlop*, 527 F.2d at 398. Transporting the necessary tools and equipment is not an activity 'undertaken for [the employees'] own convenience, not being required by the employer and not being necessary for the performance of their duties for the employer'. *Id.* Parking the vehicles at home or other alternatives to the facility is for the employees' convenience, but getting the vehicle and its contents to and from the first and last work sites is not for the employees' convenience; it is an integral and indispensable part of their jobs. *See Crenshaw v. Quarles Drilling Corp.*, 798 F. 2d 1345, 1350 (10th Cir. 1986) (oil rig mechanics' driving of specially-equipped trucks containing tools and equipment necessary to servicing oil rigs found compensable); *Secretary of Labor v.*

> *E.R. Field, Inc.*, 495 F. 2d 749, 751 (1st Cir.1974) (same; electrician driving back to shop in truck containing tools and supplies necessary for job); *DA & S Oil Well Servicing, Inc. v. Mitchell*, 262 F.2d 552, 555 (10th Cir.1958) (same; employees transporting equipment for oil well servicing). And, as in *Dunlop*, the activities are those for which the employees would ordinarily have been paid had been paid had such work been performed during the normal workday'. *Dunlop*, 527 F. 2d at 401; *see also Graham*, 828 F. Supp. at 582, n. 3. Importantly, all facility maintainers are paid for the time they spend driving between work sites during the workday."

927 F. Supp. at 1114.

House Report 104-585, May 20, 1996, issued by the Committee on Economic and Educational Opportunities to accompany H.R. 1227, stated:

> "Merely transporting tools or supplies should not change the noncompensable nature of the travel . . . "

House Report No. 104-585, p. 5. Although perhaps indicative of Congress's desire to overturn the Federal Courts' "transporting tools and equipment" decisions and the Wage and Hour regulations upon which they were premised, the foregoing pronouncement has no corollary in the text of the 1998 amendment, other than the ambiguous phrase "incidental to the use of such vehicle for commuting".

Under these circumstances, whether Plaintiffs' transportation in company vehicles of tools, equipment and

supplies to and from their daily work sites constituted a "principal activity" or an "activity incidental to the use of such vehicle" presents a genuine issue of material fact, to be resolved by the jury following a trial.

(2) There Exists A Genuine Issue Of Material Fact Whether Plaintiffs Were "Commuting" While They Participated In The BSCS And BST Home Dispatch Programs.

Prior to its amendment in 1996, § 4(a) of the Portal Act, 29 U.S.C. § 254(a), did not employ the term "commuting". The 1996 amendment to § 4(a) of the Portal Act, 29 U.S.C. § 254(a), introduced, but did not define, that term.

Plaintiffs contend that the term "commuting", as used in the amended § 4(a) of the Portal Act, 29 U.S.C. § 254(a), does not apply to their daily travels in BSCS and BST vehicles from their homes to their first work sites and from their last work sites to their homes because their first and last work sites varied from day-to-day.

BSCS and BST, however, asserts that Plaintiffs' daily travels in company vehicles from their homes to their first work sites and from the last work sites to their homes constituted "commuting" for purposes of the amended § 4(a) of the Portal Act, 29 U.S.C. § 254(a).

House Report 104-585, *supra*, did not define "commuting". Instead, at pp. 5-6, it provided the following "guidance" on this subject:

> "It is important to address two issues which are not specifically covered by H.R. 1227 but which have been raised in conjunction with it. The first

issue concerns the type of vehicle used for commuting. To be considered noncompensable travel time, the courts and the Department of Labor have generally considered that driving a company vehicle be similar to commuting in a private vehicle. The fact that a vehicle may have been modified for special purposes, displays company logos, or is specially equipped does not alter the nature of such travel.

"While H.R. 1227 does not specifically address this issue, it is the intent of the Committee that the vehicle should be of a type that does not impose substantially greater difficulties to operate than the type of vehicle which would normally be used for commuting. The fact that the vehicle may have been modified to meet the employer's specifications or requirements should not be considered a determining factor.

"The second issue concerns cost to the employee for use of the employer's vehicle. It is the intent of the Committee that the employee incur no out-of-pocket or direct cost for driving, parking or otherwise maintaining the employer's vehicle in connection with commuting in employer-provided vehicles. However, the employer shall not be responsible for unrelated expenses, such as an employee's tax liability under the provisions of the Internal Revenue Code which may result from the employee's personal use of the employer's vehicle or for traffic violations resulting from the improper operation of the vehicle by the employee."

In the absence of a statutory definition of "commuting", the question whether Plaintiffs "commuted" daily from their homes to their first work sites and from their

last work sites to their homes in BSCS and BST vehicles does not present an issue of law, but a genuine and material factual one to be resolved by the jury following a trial.

(3) There Exists A Genuine Issue Of Material Fact Whether Plaintiffs Were Engaged In A "Principal Activity" When They Received Their Daily First Job Assignments From BSCS And BST By Electronic Means "Off The Clock" (Also Known As "Connect Time").

In *Baker v. GTE North, Inc., supra,* Judge Miller stated:

> "In *Dunlop,* the Fifth Circuit reversed the decision of the district court because it 'gave a narrower interpretation of the F.L.S.A. and a broader interpretation of the Portal Act exemption that [it thought] warranted by the legislative history of the statutes or by the decisions construing them'. *Id.* at 400. The Fifth Circuit rejected the district court's 'directly related to' test, and found that the plaintiff electricians' pre-shift activities, including the filling out time sheets, checking job locations, cleaning out and loading their trucks with the necessary materials, fueling the trucks, and picking up the electrical plans for the day's jobs, were within the broad range of "principal activities" performed at their employer's behest and for the benefit of the business'. These activities would have been compensable had they been performed during the course of the workday."

927 F. Supp. at 1112.

Plaintiffs contend that they are entitled to receive overtime compensation for their "connect time", which they characterize as a "principal activity" for purposes of § 4(a) of the Portal Act, 29 U.S.C. § 254(a).

However, BSCS and BST contend the Plaintiffs' "connect time" is noncompensable because it was "incidental" to Plaintiffs' use of BSCS and BST vehicles for commuting.

"Connect time" was not addressed in P.L. 104-188, § 2101. However, House Report 104-585, *supra*, at page 5, in pertinent part stated:

> "Activities which are merely incidental to the use of an employer-provided vehicle for commuting at the beginning and end of the workday are similarly not considered part of the employee's principal activity or activities and therefore need not be compensable. It is not possible to define in all circumstances what specific tasks and activities would be considered incidental' to the use of an employer's vehicle for commuting. Communication between the employee and the employer to receive assignments or instructions, or to transmit advice on work progress or completion, is required in order for these programs to exist . . . The Committee expects that the Department of Labor will provide guidance in this area, consistent with the purposes of H.R. 1227."

The foregoing committee pronouncement has no corollary in the text of the 1996 amendment to § 4(a) of the Portal Act, 29 U.S.C. § 254(a), other than the ambiguous phrase "incidental to the use of such vehicle for commuting". Under these circumstances, for purposes of the

BSCS and BST motions for summary judgment, the question whether Plaintiffs' "connect time" was a compensable "principal activity" or a noncompensable activity "incidental" to their use of company vehicles to commute presents not a question of law, but a genuine issue of material fact to be resolved by the jury following a trial.

B. Due To The Absence Of The Requisite Legislative Findings, The Due Process Clause Bars The Retroactive Application Of P.L. 104-188, §§ 2102-2103. To Plaintiffs' Claims Against BSCS And BST For Overtime Compensation.

In *Tennessee Coal Co. v. Muscoda Local,* 321 U.S. 590 (194___), *Jewell Ridge Co. v. Local No. 6167,* 325 U.S. 161 (194___), and *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680 (194___), the Supreme Court held compensable under the Fair Labor Standards Act time that employees were required to be on their employers' premises before and after their shifts for the purposes of changing clothes and walking to and from the places where the work was carried on. Congress responded to those decisions by enacting the Portal Act, which it indeed directed be applicable to pending actions for overtime compensation. In passing the Portal Act, Congress made the following factual findings:

> "The Congress hereby finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so

interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (5) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes

> already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contract; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.
>
> "The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.
>
> "The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted . . . "

Relying upon the foregoing legislative findings, the Federal Courts consistently held that the Portal Act could rationally and constitutionally be retroactively applied to nullify pending claims for overtime compensation under the Fair Labor Standards Act **as long as certain circumstances exist**. *See, e.g., Seese v. Bethlehem Steel Co.,* 168 F.2d 58 (4th Cir. 1948), *Darr v. Mutual Life Insurance Co. of New York,* 169 F.2d 262 (2nd Cir.), *cert. denied,* 335 U.S. 871, (1948), and *Markert v. Swift & Co., Inc.,* 173 F. 2d 517 (2nd Cir. 1949).

In *Rhinebarger v. Orr,* 839 F. 2d 387 (7th Cir. 1988), the Court of Appeals held that Congress' amendment to the Fair Labor Standards Act which stayed for one (1) year

the effect of the decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), did not violate the due process rights of Indiana State Police officers who had filed suit prior to the amendment. Citing the decision in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984), for the proposition that congressional legislation meets the test of due process if the retroactive application of the legislation is itself justified by a **rational legislative purpose**, the Seventh Circuit declared:

> "Plaintiffs have failed to meet their burden of showing that the 1985 FLSA Amendment is irrational. Plaintiffs make little effort to argue that the 1985 Amendment does not fulfill a legitimate and rational legislative purpose. The Senate Report to the Amendment explains the purpose of the retroactive provisions: 'The Committee has deferred application of the FLSA overtime provisions until exactly one year after the mandate in *Garcia* so that state and local governments may make necessary adjustments in their work practices, staffing patterns, and fiscal priorities'. S.Rep. No. 99-159 at 15, 99th Cong., 1st Sess. 2, *reprinted in* 1985 U.S. Code Cong. & Ad. News 651, 663. Thus we conclude that Congress acted for the rational purpose of protecting the fiscal integrity of the states and their political subdivisions." (Footnote omitted)

839 F.2d at 388-389.[2] *See, also, Austin v. City of Bisbee*, 855 F.2d 1429, 1434-1437 (9th Cir. 1988).

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[2] Footnote 3 to the Seventh Circuit's decision in *Rhinebarger v. Orr*, 839 F. 2d at 389, quoted at great length the Senate Committee's discussion carefully balancing employee rights under the Fair Labor Standards Act against the demands upon

In enacting the 1996 amendment to the Portal Act, Congress did not find that only retroactive application would protect affected employers from unexpected hardships. Instead, House Report 104-585, at p. 6, observed:

> "Section 2 of H.R. 1227 makes the bill effective upon enactment and applicable to civil actions pending on the date of enactment, in which a final decision has not been entered. It clarifies a provision of the law that has been the subject of inconsistent and contradictory interpretations by the Department of Labor and the courts. The purpose of H.R. 1227 is to clarify the intent of the Portal-to-Portal Act as it applies to employee use of employer-provided vehicles for commuting at the beginning and end of the workday. It is therefore appropriate to apply the clarification to pending cases, as well as to future programs established by employers and employees. H.R. 1227 addresses a provision of law that has been ambiguous and the source of conflicting and contradictory interpretations by the Department of Labor. Thus, it is fair and reasonable to apply the clarification to pending cases as well as to any future situations."[3]

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the fiscal resources of the States and their political subdivision as a consequence of the *Garcia* decision of the Supreme Court.

[3] The Minority Views, which accompanied House Report No. 104-585, at p. 13 observed:

> "H.R. 1227 applies retroactively to pending litigation, notwithstanding the fact that the bill bears little relationship to the April 3 DOL opinion, or to any other previous policy enunciated by the Department of Labor regarding the treatment of time spent commuting in an employer-owned vehicle. In short, the bill substantially modifies current law and

The retroactive application of the 1996 amendment to the Portal Act to terminate these lawsuits would **violate the Due Process Clause** because, in 1989 and 1990, the Wage and Hour Division, U.S. Department of Labor put BST (and, by inference, its subsidiary, BSCS) on **express notice** that BST's failure to compensate its Home Dispatch Program participants for daily travel in company-provided vehicles from their homes to their first work sites and from their last work sites to their homes and for "connect time" **violated** the Fair Labor Standards Act.

V. CONCLUSION

The motions of BSCS and BST for summary judgments of dismissal in these lawsuits should be denied.

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intentionally seeks to immunize employers who violated the law."

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No. 98-359

In The

Supreme Court of the United States

October Term, 1998

BARNEY DOYLE, et al., and
JOSEPH CUNETTA, et al.,

Petitioners,

v.

BELLSOUTH COMMUNICATION SYSTEMS, INC., and
BELLSOUTH TELECOMMUNICATIONS, INC.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

PETITIONERS' REPLY BRIEF

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A.

PETITIONERS' FAILURE TO CHALLENGE THE CONSTITUTIONALITY OF § 2103 OF THE COMMUTING ACT BEFORE THE COURT OF APPEALS DOES NOT PREVENT THEM FROM RAISING SUCH A CHALLENGE BEFORE THIS COURT

In their Petition for Writ of Certiorari, Petitioners have acknowledged that they did not challenge the constitutionality of § 2103 of the Employee Commuting Flexibility Act of 1996 ("the Commuting Act") before the U.S. Court of Appeals for the Sixth Circuit.

Respondents, at pp. 8-10 of their Brief in Opposition, citing *Pennsylvania Department of Corrections v. Yeskey*, ___ U.S. ___, 118 S. Ct. 1952, 1956 (1998), have argued that Petitioners' failure to challenge the constitutionality of § 2103 of the Commuting Act before the Court of Appeals bars Petitioners from mounting such a challenge in this Court.

Petitioners respectfully submit that the "exceptional circumstances" – warranting this Court's consideration of an issue not presented to the Courts of Appeals – found to exist in *Youakim v. Miller*, 425 U.S. 231 (1976), and *Carlson v. Green*, 446 U.S. 14 (1980), are present in this case because:

> (1) as of December 3, 1996 – when the District Court granted Respondents' motion for summary judgment – no reported decision had explicitly declared a federal statute unconstitutional by reason of its retroactivity;
>
> (2) Petitioners' attorneys were properly concerned that sanctions could be imposed against them by the Court of Appeals pursuant

to Rule 38, Federal Rules of Appellate Procedure, if they unsuccessfully challenged the constitutionality of § 2103 of the Commuting Act;

(3) on June 25, 1998 – eighty-three (83) days after the Court of Appeals' April 3, 1998, affirmance of the District Court's judgment – this Court issued its decision in *Eastern Enterprises v. Apfel*, ___ U.S. ___, 118 S. Ct. 2131, declaring unconstitutional the retroactive liability provision of the Coal Industry Retiree Health Benefit Act of 1992 ("the Coal Act"); and

(4) the denial of the Petition for Writ of Certiorari would time-bar the between 10,000 and 20,000 as yet unidentified and unnotified participants in Respondents' Motor Vehicle Usage Program and Home Dispatch Program from challenging the constitutionality of § 2103 of the Commuting Act.

B.

PETITIONERS HAVE TIMELY NOTIFIED THE SOLICITOR GENERAL OF THE UNITED STATES OF THEIR INTENTION TO CHALLENGE THE CONSTITUTIONALITY OF § 2103 OF THE COMMUTING ACT

In their Brief in Opposition, pp. 10-11, Respondents have noted that, while this case was pending before the District Court, Petitioners did not notify the U.S. Department of Justice of their challenge to the constitutionality of § 2103 of the Commuting Act. However, the statute upon which Respondents rely, 28 U.S.C. § 2403(a), obligates the *court, not the challenging party,* to provide such

notice and the Federal Rules of Civil Procedure do not address this matter.

In addition, Respondents point to Petitioners' failure, while they were before the Court of Appeals, to provide the notice required by Rule 44, Federal Rules of Appellate Procedure. Because Petitioners did not challenge the constitutionality of § 2103 of the Commuting Act before the Court of Appeals, they were not obligated by Rule 44 to provide such a notice.

As implicitly acknowledged by Respondents, however, Petitioners have timely complied with Supreme Court Rule 29.4(b) by notifying the Solicitor General of the United States of their intention to challenge, in this Court, the constitutionality of § 2103 of the Commuting Act. Consequently, this matter is "ripe for certiorari".

PETITIONERS HAVE MOUNTED A SUBSTANTIAL CHALLENGE TO THE CONSTITUTIONALITY OF § 2103 OF THE COMMUTING ACT

Respondents, at pp. 12-13 of their Brief in Opposition, have argued that they would have prevailed in the District Court and the Court of Appeals even if § 2103 had been absent from the Commuting Act. That argument is specious because, as noted by the plurality opinion in *Eastern Enterprises v. Apfel, supra,* "retroactivity is generally disfavored in the law . . . in accordance with 'fundamental notions of justice' that have been recognized throughout history . . . " 118 S. Ct. at 2151. (Citations omitted)

Next, at pp. 13 through 15 of their Brief in Opposition, Respondents have asserted that "Congress has the constitutional authority to enact retrospective legislation" and such legislation is immune from Due Process Clause attack if it "is itself justified by a rational legislative purpose." However, the stature of the decisions cited by Respondents for the foregoing propositions has been undermined, if not destroyed, by *Eastern Enterprises v. Apfel, supra,* in which this Court declared unconstitutional the retroactive liability provision of the Coal Act.

At pp. 15-16 of their Brief in Opposition, Respondents have argued that § 2103 of the Commuting Act "does not effect a taking" of Petitioners' property for purposes of the Fifth Amendment to the Constitution. On the contrary, § 2103 of the Commuting Act took from Petitioners their legitimate expectations, founded upon this Court's decision in *Walling v. Helmerich & Payne, Inc.,* 323 U.S. 37, 42 (1944), that they would be protected by the overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, notwithstanding the contrary terms of a collective bargaining agreement. Certainly, the Fifth Amendment's concept of "property" extends to the right of employees to be lawfully compensated for services rendered to their employer several years prior to the enactment of legislation.

Finally, at pp. 16-17 of their Brief in Opposition, Respondents have contended that this Court's decision in *Eastern Enterprises v. Apfel, supra,* does not alter prior law concerning the constitutionality of retroactive federal legislation. Petitioners contend to the contrary. Ultimately, only this Court can resolve this dispute.

In summary, this Court should seize its sole opportunity to consider the constitutionality of § 2103 of the Commuting Act by granting the Petition for Writ of Certiorari.

Respectfully submitted,

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